

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 785

NATIONAL LABOR RELATIONS BOARD,  
*Petitioner,*

—v.—

THE NATURAL GAS UTILITY DISTRICT OF  
HAWKINS COUNTY, TENNESSEE,  
*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT

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**CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES****In the Matter of:****THE NATURAL GAS UTILITY DISTRICT OF  
HAWKINS COUNTY, TENNESSEE****10-RC-7070**

- 4.24.67 Petition filed by the Union  
6. 6.67 Notice of Representation Hearing, dated  
6.19.67 Hearing opened  
6.19.67 Hearing closed  
10. 6.67 Decision and direction of election, dated  
10.19.67 Respondent's motion for further hearing, dated  
10.24.67 Charging Party's motion to strike Respondent's motion, dated  
10.24.67 Board's order denying Respondent's motion for further hearing, dated  
10.27.67 Tally of Ballots held  
10.27.67 Certification on conduct of election held  
10.27.67 Notice of Election to be held  
11. 6.67 Certification of Representative, dated

**10-CA-7213**

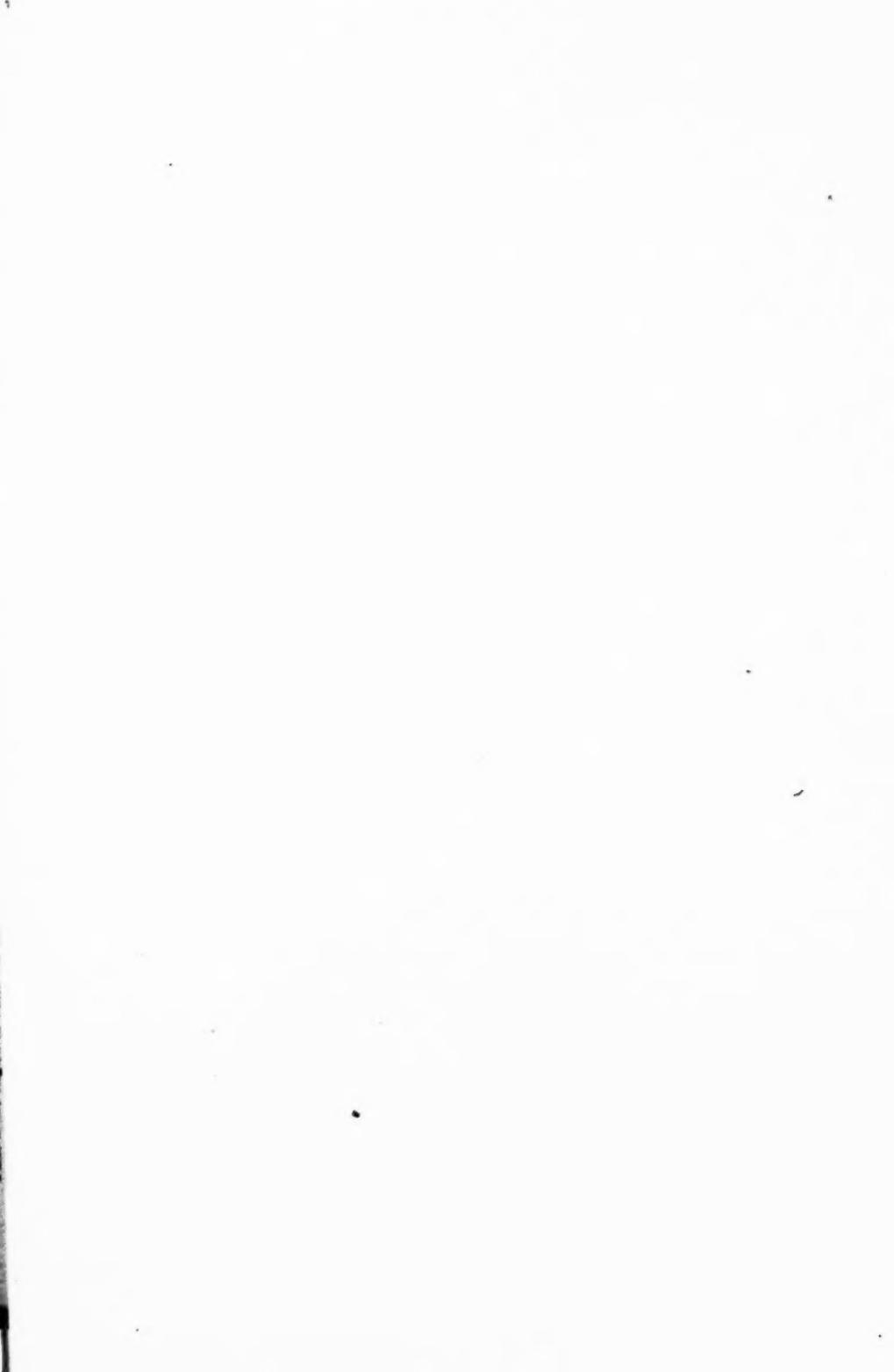
- 1.10.68 Charge filed  
2. 1.68 Complaint and notice of hearing, dated  
2. 9.68 Respondent's answer to complaint, received  
2.13.68 General Counsel's motion for summary judgment, dated (Granted, see *infra*, p. 129)  
2.19.68 Order transferring proceeding to the Board and notice to show cause, dated

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES  
(Continued)

- 2.29.68 Respondent's response to notice to show cause, received
- 4.12.68 Decision and Order issued by the National Labor Relations Board
- 11.29.68 Board's application for enforcement filed
1. 6.69 Board's certified list filed
- 9.29.69 Oral argument held
- 3.17.70 Court's opinion issued
- 4.14.70 Board's petition for rehearing and suggestion for rehearing en banc mailed
6. 5.70 Court's order issued denying petition for rehearing
- 6.23.70 Mandate issued
- 8.29.70 Extension of time for filing Board's petition for certiorari granted by Mr. Justice Stewart
10. 1.70 Board's petition for certiorari filed
- 1.11.71 Order issued by the Supreme Court of the United States granting Board's petition for certiorari

NATIONAL LABOR RELATIONS BOARD  
PETITION

10-186-7A7A  
DO NOT WRITE IN THIS SPACE  
CASE NO.



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<b>PETITION</b>			
<p><b>INSTRUCTIONS—</b> Submit one original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employee concerned is located. If more space is required for any one item, attach additional sheet, numbering item accordingly.</p> <p><b>1. Purpose of this Petition</b> (Use RC, RN, or RD in blanked and a check under Section 8(b)(7) of the Act has been filled involving the Employer named as proper authority pursuant to Section 9 of the National Labor Relations Act.)</p> <p>Below, the statement following the description of the type of petition shall not be deemed material.</p>			
<p><b>(Check one)</b></p> <p><input checked="" type="checkbox"/> <b>RC-CERTIFICATION OF REPRESENTATIVES</b>—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.</p> <p><input type="checkbox"/> <b>RM-REPRESENTATION (EMPLOYER PETITION)</b>—One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.</p> <p><input type="checkbox"/> <b>RD-DECERTIFICATION</b>—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.</p> <p><input type="checkbox"/> <b>UD-WITHDRAWAL OF UNION SHOP AUTHORITY</b>—Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.</p> <p><input type="checkbox"/> <b>UC-UNIT CLARIFICATION</b>—A labor organization is currently recognized by employer, but petitioner seeks clarification of placement of certain employees: (Check one) <input type="checkbox"/> In unit not previously certified <input type="checkbox"/> In unit previously certified in Case No. _____</p> <p><input type="checkbox"/> <b>AC-AMENDMENT OF CERTIFICATION</b>—Petitioner seeks amendment of certification issued in Case No. _____</p> <p><i>Anchored statement describing the specific amendment sought.</i></p>			
<p>b. NAME OF EMPLOYER <b>Hawkins County Natural Gas Utilities District</b></p> <p>c. ADDRESS OF ESTABLISHMENT(S) INVOLVED (Street and number, city, State, and ZIP Code)</p> <p>d. TYPE OF ESTABLISHMENT (Factory, mine, warehouse, etc.)</p> <p>e. NUMBER OF EMPLOYEES IN UNIT</p>		<p>b. NAME OF EMPLOYER REPRESENTATIVE TO CONTACT <b>Ernest P. West, Jr.</b></p> <p>c. PHONE NO.</p> <p>d. IDENTITY PRINCIPAL PRODUCT OR SERVICE <b>Natural Gas</b></p> <p>e. NUMBER OF EMPLOYEES IN UNIT</p> <p>f. PRESENT <b>10</b></p> <p>PROPOSED (BY UC/A/C) _____</p>	
<p>6b. IS THIS PETITION SUPPORTED BY 30% OR MORE OF THE EMPLOYEES IN THE UNIT?</p> <p><input checked="" type="checkbox"/> YES <input type="checkbox"/> NO</p> <p><i>*Not applicable in R.R.U.C.A.C.</i></p>			
<p>7a. <i>If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable</i></p> <p><b>7a. 1. Request for recognition as Bargaining Representative was made on <b>February 1, 1967</b> (Month, day, year)</b></p> <p>declined recognition on or about <b>February 27, 1967</b> (If no reply received, so state) (Month, day, year)</p> <p><input type="checkbox"/> Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.</p> <p><input type="checkbox"/> Recognized or Certified Bargaining Agent (If there is more, so state) NAME _____</p> <p><b>7b. NOTE</b></p>		<p>7b. <i>If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable</i></p> <p><b>7b. 2. DATE OF EXPIRATION OF CURRENT CONTRACT, IF ANY (Show month, day, and year)</b></p> <p>i. IS THERE NOW A STRIKE OR PICKETING AT THE EMPLOYER'S ESTABLISHMENT(S) INVOLVED? YES ..... NO <b>X</b></p> <p>ii. THE EMPLOYER HAS BEEN PICKETED BY OR ON BEHALF OF ..... (Insert name)</p> <p>iii. ORGANIZATION, OR ..... (Insert address)</p> <p><b>8. DATE OF RECOGNITION OR CERTIFICATION</b></p> <p><b>9. DATE OF EXPIRATION OF CURRENT CONTRACT, IF ANY (Show month, day, and year)</b></p> <p><b>10. IF YOU HAVE CHECKED BOX NO. 1 ABOVE, SHOW HERE THE DATE OF EXECUTION OF AGREEMENT GRANTING UNION SHOP (Month, day, and year)</b></p> <p><b>11b. # SO. APPROXIMATELY HOW MANY EMPLOYEES ARE PARTICIPATING?</b></p> <p><b>12. ORGANIZATIONS OR INDIVIDUALS OTHER THAN PETITIONER (AND OTHER THAN THOSE NAMED IN ITEMS 8 AND 11b), WHICH HAVE CLAIMED RECOGNITION AS MEMBERS</b></p> <p><b>SINCE</b> (Month, day, year)</p>	

**OVERSIZE PAGE - SEE NEXT FRAME  
FOR REMAINDER OF PAGE**

AC-AMENDMENT OF CERTIFICATION-Petitioner seeks amendment of certification issued in Case No. \_\_\_\_\_

An enclosed statement describing the specific amendment sought.

1. NAME OF UNION: Hawkins County Natural Gas Utilities District	EMPLOYER REPRESENTATIVE TO CONTACT Ernest P. West Jr.	PHONE NO. _____
2. ADDRESS(ES) OR ESTABLISHMENT(ES) INVOLVED (Street and number, city, State, and ZIP Code)	_____	
3. TYPE OF ESTABLISHMENT (Factory, mine, warehouse, etc.)	_____	
4. UNIT INVOLVED (In UC petition, describe PRESENT bargaining unit and attach description of proposed classification.)	5. Unit Involved: All pipefitters employed at the Employer's, Rogersville, Tennessee operation	

Included All other employees, office clerical employees, salesmen, warehousemen, professional employees, guards and supervisors as defined in the Act.

(If you have checked box RC in 1 above, check and complete EITHER item "a" or "b, whichever is applicable)

7a.  Request for recognition as Bargaining Representative was made on February 1, 1967  
declined recognition on or about February 27, 1967. (If so reply received, in state)  
(Month, day, year)

7b.  Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

b. Recognized or Certified Bargaining Agent (If there is none, so state)  
NAME \_\_\_\_\_

8. DATE OF EXPIRATION OF CURRENT CONTRACT, IF ANY (State month, day, and year)  
10. If you have checked box UD in 1 above, show here the DATE OF EXECUTION OF  
AGREEMENT GRANTING UNION SHOP (Month, day, and year)

11a. IS THERE NOW A STRIKE OR PICKETING AT THE EMPLOYER'S ESTABLISH-  
MENT(S) INVOLVED?  
YES ..... NO ..... X .....

11c. THE EMPLOYER HAS BEEN PICKETED BY OR ON BEHALF OF ..... A LABOR  
ORGANIZATION, OR ..... (Insert address)

12. ORGANIZATIONS OR INDIVIDUALS OTHER THAN PETITIONER AND OTHER THAN THOSE NAMED IN ITEMS 8 AND 11c, WHICH HAVE CLAIMED RECOGNITION AS  
REPRESENTATIVES AND OTHER ORGANIZATIONS AND INDIVIDUALS KNOWN TO HAVE A REPRESENTATIVE INTEREST IN ANY EMPLOYEES IN THE UNIT DESCRIBED IN  
ITEM 5 ABOVE. (IF NONE, SO STATE)

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM (Required only if Position is filled by Employer)
MOTT			

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.  
Plumbers and Steamfitters Local Union No. 102, Knoxville, Tennessee AFL-CIO

Business Agent Local No. 102, CIO  
(Signature of representative or person filing petition)  
Address J.216 Broadway, N.E., Knoxville, Tennessee, 37917  
(Street and number, city, State, and ZIP Code)  
(Telephone number)  
522-7413

WILFULLY FALSE STATEMENT ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT [U.S. CODE, TITLE 18, SECTION 1001]

GPO 644-233

3 K.C.)



**BEFORE THE NATIONAL LABOR RELATIONS BOARD****Tenth Region****Case No. 10-RC-7070****In the Matter of:****THE NATURAL GAS UTILITY DISTRICT OF  
HAWKINS COUNTY, TENNESSEE****—and—****UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES  
OF THE PLUMBING AND PIPE FITTING INDUSTRY OF  
THE UNITED STATES AND CANADA, AMERICAN FEDER-  
ATION OF LABOR, LOCAL UNION NO. 102**

Chancery Courtroom  
First Floor  
Hawkins County Courthouse  
Rogersville, Tennessee  
Monday, June 19, 1967.

The above-entitled matter came on for hearing, pursuant to notice, at 1:55 o'clock, p. m.

**BEFORE:****GEORGE L. CARD, Hearing Officer.****APPEARANCES:**

**JAMES O. PHILLIPS, JR., Esq., P. O. Box 144,  
Rogersville, Tennessee, 37857, appearing for the  
Employer.**

**ALLEN M. ELLIOTT, Esq., 1408 Bank of Knoxville  
Bldg., Knoxville, Tennessee, appearing for the  
Petitioner.**

**PROCEEDINGS**

**HEARING OFFICER CARD:** This hearing will be in order. This is a formal hearing in the matter of

Hawkins County Natural Gas Utilities District, Case No. 10-RC-7070, before the National Labor Relations Board. The Hearing Officer appearing for the National Labor Relations Board is George L. Card. All parties have been informed of the procedure at formal hearing before the Board by service of a Statement of Standard Procedures with the notice of hearing. I have additional copies of this statement for distribution if any party wishes more.

\* \* \* \*

**HEARING OFFICER:** On the record. I now propose to receive the formal papers. They have been marked for identification as Board's Exhibits 1(a) through 1(d), inclusive. Exhibit 1(d) being an index and description of the formal documents. These papers have been shown to both parties. Are there any objections to their receipt in evidence?

(The documents above referred to were marked Board's Exhibit 1(a) through 1(d), for identification.)

**MR. ELLIOTT:** Not at all.

**MR. PHILLIPS:** No.

**HEARING OFFICER:** Hearing no objections, the formal papers are received.

(The documents above referred to heretofore marked Board's Exhibits 1(a) through 1(d), were received in evidence.)

**HEARING OFFICER:** At this time I would like to identify and receive a motion made by the Employer, which I shall now read into the record:

"In Re: Plumbers and Steamfitters Local No. 102, Knoxville, Tennessee, AFL-CIO, Petitioner and Hawkins County Natural Gas Utilities, Employer Before the Hearing Officer for National Labor Relations Board: MOTION Comes the Employer and moves to dismiss the petition filed herein, upon the following grounds:

(1) The correct name of the employer is "The Natural Gas Utility District of Hawkins County, Tennessee,"

and the employer is not correctly named in the petition or in the orders pursuant thereto.

(2) The employer is a political subdivision of the State of Tennessee and/or Hawkins County, Tennessee, having been created pursuant to the terms and provisions of the Tennessee Utility District Act of 1937. As such, its employees are "public employees" and it is exempt from the terms and provisions of the National Labor Relations Act." Signed: "The Natural Gas Utility District of Hawkins County, Tennessee. By: J. O. Phillips, Jr., Attorney"

Does either party wish to make a statement on that motion?

MR. ELLIOTT: Mr. Hearing Officer, I would like to amend our petition to show the correct name, "The Natural Gas Utility District of Hawkins County, Tennessee."

HEARING OFFICER: Any objections to the amendment?

MR. PHILLIPS: None.

HEARING OFFICER: At this time I will grant the motion to amend the petition to show the correct name of the Employer.

MR. ELLIOTT: Thank you. And we join in issue on the second grounds of the motion.

HEARING OFFICER: All right. Have you anything at this time, or will you save this for the close?

MR. PHILLIPS: We will wait until the close.

HEARING OFFICER: At this time, gentlemen, pursuant to the Rules and Regulations of the Board, I will refer this motion to dismiss to the Board for proper consideration. Are there any further motions to be made at this time?

MR. PHILLIPS: No, sir.

MR. ELLIOTT: None.

\* \* \* \*

HEARING OFFICER: On the record. The Hearing Officer proposes the following stipulation: The Petitioner, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, American Federation of

Labor, Local Union No. 102, is a labor organization within the meaning of Section 2(5) of the Act.

Will the Petitioner so stipulate?

MR. ELLIOTT: Yes.

HEARING OFFICER: Will the Employer?

MR. PHILLIPS: Yes.

HEARING OFFICER: The Hearing Officer proposes the following stipulation: That on or about February the 1st, 1967, the Petitioner requested recognition as the bargaining representative for the employees in the unit described in the amended petition; that the Employer has and is declining to grant such recognition.

Will the Employer so stipulate?

MR. PHILLIPS: Yes.

HEARING OFFICER: Will the Petitioner so stipulate?

MR. ELLIOTT: Yes.

HEARING OFFICER: My file shows that there has been no history of collective bargaining involving the Employer and the employees within the unit requested. Is this true?

MR. PHILLIPS: That is correct.

HEARING OFFICER: Do you agree with that?

MR. ELLIOTT: As far as we know.

HEARING OFFICER: The stipulations are received.

\* \* \* \*

### ERNEST P. WEST, JR.

was called as a witness by and on behalf of the Employer and, having been first duly sworn, was examined and testified as follows:

### DIRECT EXAMINATION

\* \* \* \*

Q (By Mr. Phillips) Mr. West, you have been manager of the Natural Gas Utility District of Hawkins County, Tennessee since what date?

A March 15th, 1967.

\* \* \* \*

Q How many employees are there in the Utility District; total employees?

A Total employees number thirteen in both offices of the district.

Q And you are the manager; you included yourself within the thirteen?

A Yes, sir.

Q Do you recall how many employees there were at the time you took over the management of the district?

A There were fourteen.

Q All right, sir. Of the thirteen present employees, how many of them do and perform work which ordinarily would be referred to as pipe fitting work, steamfitting work?

A There are six employees in the Rogersville office who are at various times assigned jobs which include pipe fitting as a portion of the duties.

Q You say in the Rogersville office. Does the Utility District also maintain an office in Church Hill within Hawkins County?

A Yes, it does.

Q Did you include the employees there in the total that you have already given us?

A Yes; the thirteen includes the Church Hill office.

Q Do any of the employees at the Church Hill office do steamfitting or pipe fitting work?

A When the job requires it, yes.

Q How many?

A Two.

Q So if you have a total at the present time including the Church Hill office of how many employees that do steamfitting work?

A Eight.

\* \* \* \*

HEARING OFFICER: Could I ask you then, the five other employees that we talked about as being administrative, sales, they would not be in dispute in this matter, are they?

MR. PHILLIPS: I don't think so. There is a discrepancy, apparently, of two men, between the number named in the petition and the number we say would be involved.

HEARING OFFICER: These other five, you would not seek to include them within any unit?

MR. PHILLIPS: No.

HEARING OFFICER: All right. Mr. Elliott, I just asked Mr. Phillips are these other five that he identified as being administrative and sales employees, you do not seek to represent?

MR. ELLIOTT: We do not want those.

HEARING OFFICER: As to the eight other employees, including the two at Church Hill, do you seek to represent the employees both at Rogersville and Church Hill?

MR. ELLIOTT: Yes.

HEARING OFFICER: I note that your petition calls at the Rogersville, Tennessee operation.

MR. ELLIOTT: We don't know about the Rogersville plant—Church Hill—

HEARING OFFICER: —But you do seek them?

MR. ELLIOTT: Yes, we do seek to represent them.

HEARING OFFICER: Those eight people whose duties he has detailed.

MR. ELLIOTT: Yes.

HEARING OFFICER: Have you any questions of the witness concerning these people?

MR. ELLIOTT: We have only requested to represent what we consider ten employees of this District, regardless of where they might be working, as long as they are working employees of this Utility District.

HEARING OFFICER: All right. These eight that he enumerated as doing some pipe fitting, you all seek to represent?

MR. ELLIOTT: Yes.

HEARING OFFICER: All right. Mr. Phillips, have you anything further of this witness?

MR. PHILLIPS: I believe not.

HEARING OFFICER: Well, I have a few questions here.

Q (By The Hearing Officer) Mr. West, could you give me basically the description of the type of work at your—at the Employer's—that the Employer is engaged in?

A The Natural Gas Utility District of Hawkins County, Tennessee is engaged in the distribution and sale of natural gas.

Q And to whom do you sell this natural gas and distribute?

A To residential houses; commercial businesses; enterprises and industrial manufacturing firms.

Q In what geographical area do you make these sales?

A The eastern half of Hawkins County—we are allowed the entire county of Hawkins County—we have distribution facilities in the eastern portion only.

\* \* \* \* \*

Q Do you purchase goods from outside the State of Tennessee?

A We purchase appliances on occasions from suppliers outside the State of Tennessee, yes.

Q During the past twelve months, could you tell us what your annual purchases from outside the State of Tennessee were?

A No, sir, I don't know.

Q Were they above or below fifty thousand dollars?

A They were below fifty thousand dollars.

Q Could you tell us what in the past twelve months your annual gross volume of business was?

A Our gas sales for the fiscal year ending March 31st, 1967, was approximately three hundred and ninety thousand dollars.

Q You said "approximately," could you say directly that your gross volume of business exceeded two hundred fifty thousand dollars?

A Yes, sir.

Q Will you—you state that you buy some appliances from outside the State of Tennessee. From where do you buy this natural gas? Where does it come from?

A It is piped into the State of Tennessee by a transmission pipe line company and through their distributor in the State. We purchase the gas within the limits of the State of Tennessee.

Q You make your purchase from a distributor inside the State of Tennessee?

A Yes, sir.

Q And during the past twelve months, what would be the total price of gas which you purchased from this distributor?

A Approximately, a hundred ninety thousand or two hundred thousand dollars.

Q What is the name of this distributor?

A East Tennessee Natural Gas Company, Incorporated.

Q Will you state that East Tennessee Natural Gas Company, Incorporated, would--receives this gas from outside the State?

A Through their parent company, they do.

Q What is their parent company?

A Their parent company is Tennessee Gas Transmission Company.

Q Now, in your sales of products, you mentioned that you sell to homes, local businesses.

A Yes.

\* \* \* \*

Q Could you tell us, Mr. West, how the tax setup of the Utility District is?

A The District itself is tax exempt; both from State and local use taxes, sales taxes and federal taxes.

Q Is it a profit making organization?

A By definition and by the original legislative act or county court act, it is not a profit making organization.

Q What is the distribution of any profits made?

A The distribution of any profits would be to the County and the communities in which we distribute natural gas.

Q Are you aware, Mr. West, and can you tell us the procedures that go into creating a utility district, specifically, the Hawkins County Utility District?

A I have read the original charter and that's all. I am not aware of the procedures or any of the steps that were taken or are required to be taken.

Q How was this Utility District govern?

A Through its Board of Directors consisting of three people.

MR. PHILLIPS: Commissioners.

THE WITNESS: Excuse me. Board of Commissioners.

Q (By The Hearing Officer) Do you know how these commissioners get their jobs?

A I believe the original board was appointed by the Hawkins County Court.

Q This would be the—the Quarterly Court?

A Yes. I believe that's correct, is it not?

MR. PHILLIPS: The last part is not; appointed by the Chairman or County Judge.

HEARING OFFICER: County Judge, not by the court itself?

MR. PHILLIPS: No.

HEARING OFFICER: All right.

Q (By The Hearing Officer) You said the original ones were appointed this way. Is this a continuing process as the terms expire?

A No, sir. There are no set terms.

Q There are no set terms?

THE WITNESS: Are there?

MR. PHILLIPS: Yes.

THE WITNESS: I'll refer to Mr. Phillips then, please, for clarification or correction.

HEARING OFFICER: Maybe we can possibly get to that later. I just wanted to find out.

Q (By The Hearing Officer) You say you do not know the procedure about which a Utility District is setup?

A No, sir.

Q Who sets any rules or regulations concerning the operation of your business?

A The Board of Commissioners adopt any rules or regulations that would be necessary.

Q Who sets the fees that you charge for services?

A The Board of Commissioners.

Q Who does the hiring and firing of the employees?

A I do as the manager.

Q And you also establish labor relation policies for the company?

A This has not been completely clarified.

Q You are fairly new as manager?

A I have been here only three months.

Q Who determines the wages to be paid to their employees?

A This has been done in the past by the manager.

Q In the past by the manager. Are these employees considered to be the employees of Hawkins County, Tennessee?

A No, sir. They are not governed; they are not controlled by the County Government in anyway.

\* \* \* \*

#### CROSS-EXAMINATION

Q (By Mr. Elliott) \* \* \*

\* \* \* \*

Q Are these employees—you do the hiring now, I take it?

A Yes.

Q And the firing?

A Yes.

Q These commissioners, of course, your boss, could control that if they wanted to?

A Yes.

Q But the County Court has nothing to do with the employees?

A No, sir.

Q The State has nothing to do with the employees?

A No.

Q This District is in absolute control of the three commissioners?

A Yes, sir.

Q Do they receive a salary?

A They receive a token salary, yes. It's—what is the proper terminology?

MR. PHILLIPS: Per Diem.

THE WITNESS: Per Diem.

MR. PHILLIPS: Being not to exceed \$25 a month.

Q (By Mr. Elliott) As far as you are concern, the Hawkins County in the State of Tennessee has nothing to do with your District?

A No, sir.

Q (By The Hearing Officer) You spoke of these commissioners of your District are appointed by the County Judge.

A Yes.

Q Of Hawkins County. How does the County Judge come about his office?

A By popular election, I believe.

THE WITNESS: Is that true, Mr. Phillips?

Q (By The Hearing Officer) To the best of your knowledge.

A To the best of my knowledge, yes.

\* \* \* \* \*

### DENNIE PAYNE

was called as a witness by and on behalf of the Employer and, having been first duly sworn, was examined, and testified as follows:

### DIRECT EXAMINATION

Q (By Mr. Phillips) Mr.—you are Dennie Payne, County Court Clerk of Hawkins County, Tennessee?

A Yes, sir.

Q And, as such, you have the custody of the official records of Hawkins County?

A I do.

Q Mr. Payne, I hand you Quorum Record, Number 11, and specifically Page 347,, which seems to be dated December 16th, 1957, a matter entitled, "In Re: The Natural Gas Utility District of Hawkins County, Tennessee," ask you if that is the original order creating the Hawkins County—The Natural Gas Utility District of Hawkins County, Tennessee?

A Yes, it is. I have the original here.

Q Yes, sir. I'll ask you if you will, from that record, prepare a certified copy and file it as an exhibit to your testimony?

A Yes.

Q I'll ask you, if as custodian of the official records of Hawkins County, also have the entire transcript of the proceedings whereby The Natural Gas Utility District of Hawkins County, Tennessee, was organized?

A Yes.

Q That includes the original petition.

A Yes.

Q For the creation of the Utility District, and the Order of it at that time, it was the Chairman of the Court.

A Yes.

Q I'll ask you, if you will, to prepare a certified copy of that entire transcript and file it as an exhibit to your testimony?

A Yes, sir.

MR. PHILLIPS: No further questions.

HEARING OFFICER: As County Court Clerk, are you familiar with the method in which the County Judge is, comes about his office?

THE WITNESS: Yes.

HEARING OFFICER: How is this done?

THE WITNESS: At this time, it was under the Chairman. He was elected by the members of the Court at this particular time.

HEARING OFFICER: At the time the petition was filed—

MR. PHILLIPS: —No, sir.

THE WITNESS: Sir.

MR. PHILLIPS: No—I'm sorry. You may have been talking about one petition, and I'm thinking about another one.

HEARING OFFICER: We are talking about the petition filed by the—creating the utility—

MR. PHILLIPS: —He's correct.

HEARING OFFICER: He was chosen by a vote of County Commissioners.

THE WITNESS: Yes.

HEARING OFFICER: How were the magistrates chosen?

THE WITNESS: They were elected by popular vote county wide.

HEARING OFFICER: All right. Are you familiar as County Court Clerk with the method in which a utility district is formed?

THE WITNESS: Well, I have had some since I have been in office.

HEARING OFFICER: Could you tell us to the best of your recollection and knowledge the procedures whereby a utility district is formed, in specifics, this one?

THE WITNESS: You have to have a petition first filed with the Court, with so many—I believe it's twenty-five signatures, I believe, or more required on it. I believe that's right.

HEARING OFFICER: These would be signatures of whom?

THE WITNESS: Of real estate property holders.

HEARING OFFICER: Within the county?

THE WITNESS: Yes.

HEARING OFFICER: All right.

THE WITNESS: Then there is a date set for the hearing before the Chairman, or the Judge it would be now—County Judge.

HEARING OFFICER: Is this in reality the same position of County Judge and Chairman of County Court?

THE WITNESS: Well, yes. It was set up as a special act in Hawkins County, but, I believe, they have a general bill that now supersedes that, I believe.

HEARING OFFICER: All right. Would you proceed then? The hearing has been set by the County Judge; what then happens?

THE WITNESS: Well, he decides—he hears the testimony of these witnesses who has petitioner for it, you know, they are represented by an attorney, and he decides whether it's needed or not.

HEARING OFFICER: If he determines that it is needed, what does he then do?

THE WITNESS: He signs the order.

HEARING OFFICER: An order such as you have just identified?

THE WITNESS: That's right; here it is.

HEARING OFFICER: Then what happens after that, he's filed an order? Who governs the utility district?

THE WITNESS: Appoints a committee—there is a committee appointed in here. I believe one is two; one is four; maybe—one is six, something, so many years. It's set out in the order.

HEARING OFFICER: Appointed by the County Judge?

THE WITNESS: Yes.

HEARING OFFICER: Or the Chairman of the County Court at this time?

THE WITNESS: There—they are requested in this order, I believe, in this petition, and if he approves it, why—

HEARING OFFICER: —The appointment is made?

THE WITNESS: By County Judge in the order.

HEARING OFFICER: If one of these commissioners should resign, or die, or cease to function as a commissioner, would a new commissioner be chosen?

THE WITNESS: Yes, they do, but I'm not too sure about that. I believe that the County Court—I believe the names is presented to the Court—County Court, and they approve it. I believe that's right. I'm not too sure about that.

HEARING OFFICER: The County Court being popularly elected?

THE WITNESS: That's right.

\* \* \* \*

MR. PHILLIPS: The Employer now offers into evidence Section 6-2601—6-2627, inclusive, of the Tennessee Code Annotated, which is Chapter 26 of said Code, and is generally referred to as "The Utility District Act of 1937."

HEARING OFFICER: Any objections to the receipt of this document?

MR. ELLIOTT: No objections.

HEARING OFFICER: Then this document will be marked Employer's Exhibit 1, and will be received into evidence.

MR. PHILLIPS: Yes.

HEARING OFFICER: In an off-the-record discussion, the Employer requested permission to withdraw the original and make copies to submit to the court reporter. Are there any objections to that proceeding?

MR. ELLIOTT: No objections at all.

HEARING OFFICER: And the request to withdraw the original is granted, and copies can be made and provisions will be made with the court reporter for copies of this exhibit, and the exhibit is received.

(The document above referred to, to be marked Employer's Exhibit Number 1 and received in evidence.)

\* \* \* \* \*

HEARING OFFICER: On the record. In an off-the-record discussion, the Employer wished to amend his offer of the exhibit, Employer's Exhibit 1, to include the amendment contained in the pocket supplement of the volume of the Tennessee Code Annotated. Is that a correct statement of what we are doing?

MR. PHILLIPS: That is correct.

MR. ELLIOTT: That is correct.

HEARING OFFICER: Is that agreeable with both parties?

MR. ELLIOTT: No objections.

HEARING OFFICER: All right. Then the Exhibit 1, as amended, is received.

\* \* \* \* \*

MR. PHILLIPS: Employer desires to introduce a certified copy of the original petition to the County Court of Hawkins County, Tennessee, for the creation of the Natural Gas Utility District of Hawkins County, Tennessee, the same being properly identified and certified by the County Court Clerk.

(The document above referred to was marked Employer's Exhibit Number 2 for purposes of identification.)

HEARING OFFICER: Any objections?

MR. ELLIOTT: No objections.

HEARING OFFICER: Then that is received as Employer's Exhibit 2.

(The document above referred to was heretofore marked Employer's Exh. No. 2 and received in evidence.)

**MR. PHILLIPS:** The Employer now offers into evidence a certified copy of the Order of the County Court of Hawkins County, Tennessee, under date of December 16th, 1957, creating The Natural Gas Utility District of Hawkins County, Tennessee, and naming the commissioners of said district.

(The document above referred to was marked Employer's Exhibit Number 3 for purposes of identification.)

**HEARING OFFICER:** This earlier was also identified from the original by the County Court Clerk. Any objections?

**MR. ELLIOTT:** No objections.

**HEARING OFFICER:** Then that is received as Employer's Exhibit 3.

(The document above referred to heretofore marked Employer's Exhibit No. 3, was received in evidence.)

\* \* \* \*

**MR. PHILLIPS:** With respect to Exhibit Number 1, the Employer would like to specifically point out that Code Section 6-2607, with reference to Utility Districts reads as follows:

From and after the date of the making and filing of such order of incorporation, the district so incorporated shall be a municipality or public corporation in perpetuity under its corporate name, and the same shall in that name be a body politic incorporated with powers of perpetual succession, but without any power to levy or collect taxes. Charges for services authorized herein shall not be construed as taxes. The powers of each District shall be vested in and exercised by a majority of the members of the Board of Commissioners of the District so long as the District continues to furnish any of the services which it is herein authorized to furnish. It shall be the sole public corporation empowered to furnish such services in the District unless and until it shall have been established that the public and convenience—that the public convenience and necessity requires of it other or additional services.

It is on the basis of this specific section and other sections making the utility district not subject to regulation of the utility commission as are ordinary utilities making it tax exempt; that the Employer contends that it is a municipality or public political subdivision and as such, not subject to the provision of the National Labor Relations Act.

\* \* \* \* \*

MR. PHILLIPS: I believe Mr. West mentioned the fact that profits are distributed to the communities involved. I think the Act itself will perhaps show that, but I don't believe there is actually any distribution of profits, as such, contemplated by a utility district, but the communities would obtain the benefit of any efficiency from the operation in the reduced rates for the gas used by them.

\* \* \* \* \*

MR. ELLIOTT: I would, if it's permissible, I'd like to have Mr. Phillips state how the financing was arranged; this million dollars as you stated off the record awhile ago.

HEARING OFFICER: If you are familiar with that, sir.

MR. PHILLIPS: Do you want me to take the witness stand?

Hearing Officer: I'll allow it as statement of counsel.

MR. PHILLIPS: The financing was arranged by private sale of bonds. Mr. Hugh G. Mark & Company of Birmingham, Alabama was the fiscal agent which handled the sale of the District bonds.

MR. ELLIOTT: Was there actually a million dollars sold, Mr. Phillips?

MR. PHILLIPS: I believe that is mighty close to the figure. It might have been nine hundred thousand; it might have been a million one hundred thousand dollars.

MR. ELLIOTT: Those were sold to anybody that agreed to pay for them?

MR. PHILLIPS: Yes.

\* \* \* \* \*

## EMPLOYER'S EXHIBIT No. 1

**THE UTILITY DISTRICT LAW OF 1937  
TITLE 6—MUNICIPAL CORPORATIONS.  
CHAPTER 26—UTILITY DISTRICTS**

Tennessee Code Annotated of 1955  
Secs. 6-2601 - 6-2627, inclusive  
Original Codification

**CHAPTER 26  
UTILITY DISTRICTS**

SECTION.	SECTION.
6-2601. Short title.	6-2615. Compensation of commissioners — Delegations of powers — Officers — Records — Qualifications.
6-2602. Petition for creation.	6-2616. Powers of commissioners.
6-2603. Districts in two or more counties.	6-2617. Publication of annual statement.
6-2604. Hearing and order of approval.	6-2618. Protest of rates.
6-2605. Cost of establishment proceedings.	6-2619. Purposes for which bonds authorized.
6-2606. Appeal to circuit court.	6-2620. Terms of bonds.
6-2607. District as municipality—Powers.	6-2621. Covenants permissible in bonds.
6-2608. Power to operate utilities.	6-2622. Bonds valid despite irregularities.
6-2609. Subscribers' consent to new services.	6-2623. Remedies of bondholders.
6-2610. Powers in carrying out purposes.	6-2624. Bonds payable from revenue.
6-2611. Eminent domain.	6-2625. Rates sufficient to pay costs and retire bonds.
6-2612. General implementing powers.	6-2626. Exemption from taxation.
6-2613. Exemption from state regulation.	6-2627. Chapter unaffected by other law.
6-2614. Terms of commissioners — Vacancies.	

**6-2601. Short title.**—This chapter shall be cited as "The Utility District Law of 1937." [Acts 1937, ch. 248, § 1; C. Supp. 1950, § 3695.26.]

*Cited:* Madison Suburban Utility Dist. v. Carson (1949), 191 Tenn. 300, 232 S. W. (2d) 277.

## NOTES TO DECISIONS

### *1. Constitutionality.*

The creation of a suburban water utility district did not result in the creation of a monopoly in violation of the Const., Art. 1, § 22. *First Suburban Water Utility Dist. v. McCanless* (1941), 177 Tenn. 128, 146 S. W. (2d) 948.

### *2. Application of Chapter.*

This chapter, which may apply to all sections of this state, is not exclusive, as sanitary conditions may vary as to different parts of the state. *Whedbee v. Godsey*

(1950), 190 Tenn. 140, 228 S. W. (2d) 91.

### *3. Private Act Creating District.*

Private Acts 1945, ch. 276, providing for a sanitary district for Fountain City did not violate Const., Art. 11, § 8 on the ground that it suspended the general law set forth in this chapter, as such private act created a public corporation with governmental powers over which legislature had absolute control. *Whedbee v. Godsey* (1950), 190 Tenn. 140, 228 S. W. (2d) 91.

**6-2602. Petition for creation.**—A petition for the incorporation of a utility district may be submitted to the county judge or chairman of the county court of any county in which the proposed district is situated, said petition to be signed by not less than twenty-five (25) owners of real property, who shall also reside within the boundaries of the proposed district. Said petition shall include (a) a statement of the necessity for the service or services to be supplied by the proposed district; (b) the proposed corporate name and boundaries of the district; (c) an estimate of the cost of the acquisition or construction of the facilities of the district (which estimate shall not, however, serve as a limitation upon the financing of improvements, or extensions of the facilities), and (d) the nomination of three (3) residents of the district for appointment as commissioners of the district. The petition shall be signed in person by the petitioners with the addresses of their residences and shall be accompanied by a sworn statement of the person or persons circulating the petition, who shall state under oath that he or they witnessed the signature of each petitioner, that each signature is the signature of the person it purports to be, and that to the best of his or their knowledge each petitioner was, at the time of signing, an owner of real property within and a resident of the proposed district. [Acts 1937, ch. 248, § 2; C. Supp. 1950, § 3695.27.]

*6-2603. Districts in two or more counties.*—Public utility districts embracing territory in two (2) or more counties may be created under the provisions of this chapter. In all such cases the petition for incorporation shall be submitted to the county judge or chairman of the county court of the county having the largest number of inhabitants according to the then last preceding United States census, and such county, judge or chairman shall have jurisdiction to proceed with such petition in like manner as if the territory involved were situated wholly within one (1) county; provided, however, that notice of the hearing on such petition shall be published in a newspaper of general circulation in each county embraced or partly embraced within such proposed district. Districts embracing territory in two (2) or more counties shall have and possess all of the powers conferred upon utility districts by this chapter as heretofore or hereafter amended. [Acts 1953, ch. 122, § 1.]

*6-2604. Hearing and order of approval.*—Upon receipt of such petition it shall be the duty of the county judge or chairman of the county court to fix a time and place for a public hearing upon the convenience and necessity of the incorporation of the district. The date of such hearing shall be not more than thirty (30) days after the receipt of the petition and its date, place and purpose shall be announced by the county judge or chairman of the county court in a notice published not more than fifteen (15) days nor less than seven (7) days prior to the date of the hearing in a newspaper of general circulation in the proposed district, or if there be no such newspaper, then by posting such notice in five (5) conspicuous public places within the boundaries of the proposed district. If at said public hearing the county judge or chairman of the county court finds (a) that the public convenience and necessity requires the creation of the district, and (b) that the creation of the district is economically sound and desirable, he shall enter an order of the court so finding, approving the creation of the district, designating it as "the

Utility District of  
County, Tennessee," defining its territorial limits and

appointing as commissioners of the district those persons nominated in the petition, of whom one (1) shall be appointed for a term of two (2) years, one (1) for a terms of three (3) years, and one (1) for a term of four (4) years. Such order shall be filed with the clerk of the court and entered on record. [Acts 1937, ch. 248, § 2; C. Supp. 1950, § 3695.27.]

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lative power to the county judge or chairman. First Suburban Water Utility Dist. v. McCannless (1941), 177 Tenn. 128, 146 S. W. (2d) 948.

**6-2605. Cost of establishment proceedings.**—All costs incident to the publication and posting of notices, and to the public hearing and determination, and all court costs including the costs of filing and entering the said order, shall be borne by the parties filing the petition, and the county judge or chairman of the county court may, in his discretion, require the execution by the parties filing the petition of a cost bond in an amount and with good securities to guarantee the payment of such costs. [Acts 1937, ch. 248, § 2; C. Supp. 1950, § 3695.27.]

**6-2606. Appeal to circuit court.**—Any party having an interest in the subject-matter and aggrieved or prejudiced by the finding and adjudication of the county judge or chairman of the county court, may pray and obtain an appeal therefrom to the circuit court of the county in the manner provided by law for appeals from the county court, upon the execution of appeal bond, as provided by law. [Acts 1937, ch. 248, § 2; C. Supp. 1950, § 3695.27.]

**6-2607. District as municipality—Powers.**—From and after the date of the making and filing of such order of incorporation, the district so incorporated shall be a "municipality" or public corporation in perpetuity under its corporate name and the same shall in that name be a body politic and corporate with power of perpetual succession, but without any power to levy or collect

taxes. Charges for services authorized herein, shall not be construed as taxes. The powers of each district shall be vested in and exercised by a majority of the members of the board of commissioners of the district. So long as the district continues to furnish any of the services which it is herein authorized to furnish, it shall be the sole public corporation empowered to furnish such services in the district unless and until it shall have been established that the public convenience and necessity requires other or additional services. [Acts 1937, ch. 248, § 3; C. Supp. 1950, § 3695.28.]

#### NOTES TO DECISIONS

##### 1. *Nature of District.*

This section clearly classes and characterizes a utility district created under its provisions as an operation for a state, government-

al or public purpose and as a municipality or public corporation. First Suburban Water Utility Dist. v. McCanless (1941), 177 Tenn. 128, 146 S. W. (2d) 948.

**6-2608. Power to operate utilities.**—Any district heretofore or hereafter created under authority of this chapter is empowered to conduct, operate, and maintain a system or systems for the furnishing of water, sewer, sewage disposal, natural gas, artificial gas, police, fire protection, garbage collection and garbage disposal, street lighting, parks and recreational facilities, or two or more of such systems, and to carry out such purpose it shall have the power and authority to acquire, construct, reconstruct, improve, better, extend, consolidate, maintain and operate such system or systems, within or without the district, and to purchase from, and furnish, deliver and sell to any municipality, the state, any public institution and the public, generally, any of the services authorized by this chapter; provided, that with respect to the conduct and operation of a police protection system nothing contained in this chapter shall be construed as meaning or intending any encroachment upon the police powers of the sheriff of any county in this state, but shall only empower the district to conduct and operate such police protection system when it is enabled to do so through legal arrangements with the sheriff of the county, and other constituted authorities,

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in a manner consistent with all provisions of the Constitution of Tennessee; and provided, further, that the inclusion of the power of conducting and operating a police protection system as one of the purposes for which a district may be created, shall not in any wise affect the validity of this section, the legislature hereby expressly declaring its purpose to enact the remainder of this section without the provision herein contained authorizing the conduct and operation of a police protection system, if the inclusion of such provision should be held invalid. [Acts 1937, ch. 248, § 5; 1947, ch. 76, § 2; C. Supp. 1950, § 3695.30; Acts 1951, ch. 262, § 2.]

*Cross-References.* Extension of service outside district, § 6-604.

#### NOTES TO DECISIONS

##### 1. Right to Question Constitutionality.

The constitutionality of the chapter could not be attacked by the state and county taxing authorities on the ground that this section provides that the district may extend itself beyond its corporate boundaries where there was no

showing that such an extension had in fact been made or that such an extension could militate to the disadvantage of the state and county taxing authorities in the discharge of their duties. First Suburban Water Utility Dist. v. McCanless (1941), 177 Tenn. 128, 146 S. W. (2d) 948.

**6-2609. Subscribers' consent to new services.**—No utility district created prior to March 4, 1947, under the terms and provisions of this chapter shall undertake to render, obligate itself to render, or render, services other than those for the furnishing of water, sewer, sewage disposal, fire protection, natural gas or artificial gas, unless and until it shall first have obtained the consent in writing of subscribers representing seventy-five percent (75%) in number of the total subscribers to the existing services furnished by said utility district at the time such written consents are obtained. The determination by the board of commissioners of any such district as to the percentage represented by the written consent of such subscribers shall be conclusive, that no such district may furnish natural gas service to any area now actually served by a private company. [Acts

1937, ch. 248, § 5; 1947, ch. 76, § 2; C. Supp. 1950, § 3695.41 (Williams, § 3695.30); Acts 1951 ch. 262, § 2.]

*6-2610. Powers in carrying out purposes.*—Any district created pursuant to this chapter shall have the power;

(a) To sue and be sued.

(b) To have a seal.

(c) To acquire by purchase, gift, devise, lease or exercise of the power of eminent domain or other mode of acquisition, hold and dispose of real and personal property of every kind within or without the district, whether or not subject to mortgage or any other liens.

(d) To make and enter into contracts, conveyances, mortgages, deeds of trust, bonds or leases.

(e) To incur debts, to borrow money, to issue negotiable bonds and to provide for the rights of holders thereof.

(f) To fix, maintain, collect and revise rates and charges for any service.

(g) To pledge all or any part of its revenues.

(h) To make such covenants in connection with the issuance of bonds, or to secure the payments of bonds, that a private business corporation can make under the general laws of the state, notwithstanding that such covenants may operate as limitations on the exercise of any power granted by this chapter.

(i) To use any right-of-way, easement or other similar property right necessary or convenient in connection with the acquisition improvement, operation or maintenance of a utility, held by the state or any political subdivision thereof, provided that the governing body of such political subdivision shall consent to such use. [Acts 1937, ch. 248, § 7; C. Supp. 1950, § 3695.33 (Williams, § 3695.32).]

*6-2611. Eminent domain.*—Any district shall have power to condemn either the fee or such right, title interest, or easement in the property as the board may deem necessary for any of the purposes mentioned in this chapter, and such property or interest in such property may be so acquired whether or not the same is

owned or held for public use by corporations, associations or persons having the power of eminent domain, or otherwise held or used for public purposes; provided, however, such prior public use will not be interfered with by this use. Such power of condemnation may be exercised in the mode or method of procedure prescribed by chapter 14 of title 23, or in the mode or method or procedure prescribed by any other applicable statutory provisions now in force or hereafter enacted for the exercise of the power of eminent domain; provided, however, that where title to any property sought to be condemned is defective, it shall be passed by decree of court; provided, further that where condemnation proceedings become necessary the court in which such proceedings are filed shall upon application by the district and upon the posting of a bond with the clerk of the court in such amount as the court may deem commensurate with the value of the property, order that the right of possession shall issue immediately or as soon and upon such terms as the court, in its discretion, may deem proper and just. [Acts 1937, ch. 248, § 18; mod. C. Supp. 1950, § 3695.44 (Williams, § 3695.43).]

6-2612. *General implementing powers.*—Any district created pursuant to the provisions of this chapter shall be vested with all the powers necessary and requisite for the accomplishment of the purpose for which such district is created, capable of being delegated by the legislature. No enumeration of particular powers herein created shall be construed to impair or limit any general grant of power herein contained nor to limit any such grant to a power or powers of the same class or classes as those enumerated. The district is empowered to do all acts necessary, proper or convenient in the exercise of the powers granted herein. [Acts 1937, ch. 248, § 6; C. Supp. 1950, § 3695.32 (Williams, § 3695.31).]

6-2613. *Exemption from state regulation.*—Neither the railroad and public utilities commission nor any other board or commission of like character hereafter created shall have jurisdiction over the district in the management and control of any system, including the regulation of its rates, fees, tolls or charges. [Acts 1937,

ch. 248, § 16; C. Supp. 1950, § 3695.42 (Williams, § 3695.41).]

*6-2614. Terms of commissioners—Vacancies.*—The terms of office of the members of the board of commissioners first appointed shall be two (2), three (3) and four (4) years respectively from date of appointment and thereafter the term of office of the members shall be four (4) years. Members shall hold office until their successors are elected and qualify. Any vacancy shall be filled and new commissioners shall be elected or old commissioners shall be reelected upon the expiration of any term of office by vote of the other commissioners then in office. In the event the two (2) commissioners cannot agree upon a new commissioner to fill any vacancy, they shall certify that fact to the county judge or chairman of the county court within thirty (30) days of the date upon which such vacancy occurs, and, thereupon, within ten (10) days the county judge or chairman of the county court shall appoint a third commissioner to fill such vacancy. [Acts 1937, ch. 248, § 4; C. Supp. 1950, § 3695.29.]

#### NOTES TO DECISIONS

##### *1. Removal or Ouster.*

The provisions of this section providing for the appointment of the members of the board of commissioners and their successors are not invalid as making no provi-

sions for the ouster or removal of the commissioners as the provisions of the general ouster law, § 8-2701 et seq., applies. First Suburban Water Utility Dist. v. McCanless (1941), 177 Tenn. 128, 146 S. W. (2d) 948.

*6-2615. Compensation of commissioners—Delegation of powers—Officers—Records—Qualifications.*—The members of the board shall serve without compensation for their services, but shall be entitled to reimbursement for all expenses incurred in connection with the performance of their duties. The board may delegate to one (1) or more of its members or to its agents and employees such powers and duties as it may deem proper, but at its first meeting and at the first meeting of each calendar year thereafter it shall elect one (1) of its members to serve as president, and another of its members as secretary of the commission. The secretary shall keep a

record of all proceedings of the commission which shall be available for inspection as other public records, and shall be custodian of all official records of the district. Only persons resident in the district shall be eligible for election to the board. [Acts 1937, ch. 248, § 4; C. Supp. 1950, § 3695.29.]

*6-2616. Powers of commissioners.*—The board of commissioners of any district shall have power and authority;

(1) To exercise by vote, ordinance or resolution all of the general and specific powers of the district.

(2) To make all needful rules, regulations and by-laws for the management and the conduct of the affairs of the district and of the board.

(3) To adopt a seal for the district, prescribe the style thereof, and alter the same at pleasure.

(4) To lease, purchase, sell, convey and mortgage the property of the district and to execute all instruments, contracts, mortgages, deeds or bonds on behalf of the district in such manner as the board shall direct.

(5) To inquire into any matter relating to the affairs of the district, to compel by subpoena the attendance of witnesses and the production of books and papers material to any such inquiry, to administer oaths to witnesses and to examine such witnesses.

(6) To appoint and fix the salaries and duties of such officers, experts, agents and employees as it deems necessary, to hold office during the pleasure of the board and upon such terms and conditions as the board may require.

(7) To do all things necessary or convenient to carry out its functions. [Acts 1937, ch. 248, § 8; C. Supp. 1950, § 3695.34 (Williams, § 3695.33).]

*6-2617. Publication of annual statement.*—Within ninety (90) days after the close of the fiscal year of each district organized and operating under the provisions of this law, the commissioners of the district shall publish in a newspaper of general circulation, published in the county in which the district is situated, a state-

ment showing (a) the financial condition of the district at the end of the fiscal year; (b) the earnings of the district during the fiscal year just ended; (c) a statement of the water rates then being charged by the district, and a brief statement of the method used in arriving at such rates. [Acts 1949, ch. 256, § 1; C. Supp. 1950, § 3695.46 (Williams, § 3695.43a).]

6-2618. *Protest of rates.*—Within thirty (30) days of the date on which this statement is published, any water user of the district may file with the commissioners of the district a protest, giving reasons why, in the opinion of the water user, the rates so published are too high or too low. Within a period of fifteen (15) days after the end of this thirty (30) day period during which such protest may be filed, the commissioners shall notify each such protestant of a hearing to be held by the commissioners on such protests as may have been filed within the thirty (30) day period prescribed. Upon the hearing date so fixed, which shall be some date within a period of sixty (60) days after giving such notices to the protestants, all such protests shall be heard together by the commissioners. After hearing and examining statements, exhibits and arguments of the protestants, or their counsel the commissioners shall make and spread upon the minutes of the commission their finding as to the reasonableness or unreasonableness of the published rates, and at the same time the commission may increase or decrease such rates upon a finding that they are too low or too high, as the case may be.

The commissioners shall not be required to receive, consider or act upon any protest filed at any time other than within the thirty (30) day period provided in this section.

Any protestant feeling himself aggrieved by the final action of the commissioners under this section may obtain a review of the commissioners' action in the circuit court of the county in which the district is situated through the common law writ of certiorari. [Acts 1949, ch. 256, § 1; C. Supp. 1950, § 3695.46 (Williams, § 3695.43a).]

**6-2619. Purposes for which bonds authorized.**—Each district shall have power and is hereby authorized from time to time to issue its negotiable bonds in anticipation of the collection of revenues for the purpose of constructing, acquiring, reconstructing, improving, bettering or extending any water, sewer, sewage disposal, natural gas, artificial gas, fire protection, garbage collection or garbage disposal system, systems, or combination thereof, and to pledge to the payment of the interest and principal of such bonds all or any part of the revenues derived from the operation of such system, systems, or combinations thereof. There may be included in the costs for which bonds are to be issued, reasonable allowances for legal, engineering and fiscal services, interest during construction and for six (6) months after the estimated date of completion of construction, and other preliminary expenses, including the expenses, including the expenses of incorporation of the district. [Acts 1937, ch. 248, § 9; C. Supp. 1950, § 3695.35 (Williams, § 3695.34); Acts 1951, ch. 262, § 3.]

**6-2620. Terms of bonds.**—Said bonds shall be authorized by resolution of the board of the district, and may be issued in one (1) or more series; may bear such date or dates; may mature at such time or times not exceeding forty (40) years from their respective dates; may bear interest at such rate or rates not exceeding six per cent (6%) per annum payable semiannually; may be in such form, either coupon, or registered; may be executed in such manner; may be payable in such medium of payment, at such place or places, and be subject to such terms of redemption, with or without premium, and may contain such terms, covenants and conditions as such resolution or subsequent resolution may provide. Said bonds may be issued for money or property; may be sold in such manner and upon such terms as the board shall determine provided that the interest cost to maturity of the money or property (at its value as determined by such board, whose determination shall be conclusive) received for any issue of said bonds shall not exceed six per cent (6%) per annum payable semiannually. Pending the preparation of the definitive bonds, interim re-

ceipts or certificates in such form and with such provisions as the governing body may determine may be issued to the purchaser or purchasers of bonds sold pursuant to this chapter. Said bonds and interim receipts or certificates shall be fully negotiable within the meaning of and for all purposes of the Uniform Negotiable Instruments Law of the state. [Acts 1937, ch. 248, § 9; C. Supp. 1950, § 3695.35 (Williams, § 3695.34).]

*6-2621. Covenants permissible in bonds.*—Any resolution authorizing the issuance of bonds under this chapter may contain covenants, including, but not limited to (a) the purpose or purposes to which the proceeds of the sale of said bonds may be applied and the deposit, use and disposition thereof; (b) the use, deposit, securing of deposits, and disposition of the revenues of the district, including the creation and maintenance of reserves; (c) the issuance of other additional bonds payable from the revenues of the district; (d) the operation and maintenance of the system or systems; (e) the insurance to be carried thereon and the use, deposit and disposition of insurance moneys; (f) books of account and the inspection and audit thereof and the accounting methods of the district; (g) the nonrendering of any free service by the district; and (h) the preservation of the system or systems, so long as any of the bonds remain outstanding, from any mortgage, sale, lease or other encumbrance not specifically permitted by the terms of the resolution. [Acts 1937, ch. 248, § 10; C. Supp. 1950, § 3695.36 (Williams, § 3695.35).]

*6-2622. Bonds valid despite irregularities.*—Said bonds bearing the signatures of officers in office on the date of the signing thereof shall be valid and binding obligations, notwithstanding that before the delivery thereof and payment therefor any or all the persons whose signatures appear thereon shall have ceased to be officers of the district issuing the same. The validity of said bonds shall not be dependent on nor affected by the validity or regularity of any proceedings relating to the acquisition, purchase, construction, reconstruction, improvement, betterment, or extension of the utility for which said bonds are issued. The resolution authorizing

said bonds may provide that the bonds shall contain a recital that they are issued pursuant to this chapter, which recital shall be conclusive evidence of their validity and of the regularity of their issuance. [Acts 1937, ch. 248, § 12; C. Supp. 1950, § 3695.38 (Williams, § 3695.37).]

6-2623. *Remedies of bondholders.*—There shall be and there is created a statutory lien in the nature of a mortgage lien upon any system or systems acquired or constructed in accordance with this chapter, including all extensions and improvements thereto or combinations thereof subsequently made, which lien shall be in favor of the holder or holders of any bonds issued pursuant to this chapter and all such property shall remain subject to such statutory lien until the payment in full of the principal of and interest on said bonds. Any holder of said bonds or any of the coupons representing interest thereon may either at law or in equity, by suit, action, mandamus, or other proceeding, in any court of competent jurisdiction, protect and enforce such statutory lien and compel performance of all duties required by this chapter, including the making and collection of sufficient rates for the service or services, the proper accounting therefor, and the performance of any duties required by covenants with the holders of any bonds issued in accordance herewith.

If any default be made in the payment of the principal of or interest on such bonds, any court having jurisdiction of the action may appoint a receiver to administer said district, and said system or systems, with power to charge and collect rates sufficient to provide for the payment of all bonds and obligations outstanding against said system or systems and for the payment of operating expenses, and to apply the income and revenues thereof in conformity with the provisions of this chapter, and any covenants with bondholders. [Acts 1937, ch. 248, § 11; C. Supp. 1950, § 3695.37 (Williams, § 3695.36).]

## NOTES TO DECISIONS

**1. Revenue Held in Trust.**

A utility district cannot lawfully use any current revenue to pay the cost of private sewer lines and connections, all such revenue being

held in trust by the utility commissioners to liquidate bonds of the district. *Cline v. Red Bank Utility Dist.* (1952), 194 Tenn. 255, 250 S. W. (2d) 362.

**6-2624. Bonds payable for revenue.**—No holder or holders of any bonds issued pursuant to this chapter shall ever have the right to compel the levy of any tax to pay said bonds or the interest thereon. Each bond shall recite in substance that said bond and interest thereon is payable solely from the revenue pledged to the payment thereof and that said bond does not constitute a debt of the district within the meaning of any statutory limitation. [Acts 1937, ch. 248, § 13; C. Supp. 1950, § 3695.39 (Williams, § 3695.38).]

**6-2625. Rates sufficient to pay costs and retire bonds.**—The board of commissioners of any district issuing bonds pursuant to this chapter shall prescribe and collect reasonable rates, fees, tolls, or charges for the services, facilities and commodities of its system or systems, shall prescribe penalties for the nonpayment thereof, and shall revise such rates, fees, tolls or charges from time to time whenever necessary to insure that such system or systems shall be and always remain self-supporting. The rates, fees, tolls or charges prescribed shall be such as will always produce revenue at least sufficient (a) to provide for all expenses of operation and maintenance of the system or systems, including reserves therefor, and (b) to pay when due all bonds and interest thereon for the payment of which such revenues are or shall have been pledged, charged or otherwise encumbered, including reserves therefor. [Acts 1937, ch. 248, § 14; C. Supp. 1950, § 3695.40 (Williams, § 3695.39).]

**6-2626. Exemption from taxation.**—So long as a district shall own any system, the property and revenue of such system shall be exempt from all state, county and municipal taxation. Bonds issued pursuant to this chapter and the income therefrom shall be exempt from all state, county and municipal taxation, except inheritance,

transfer and estate taxes, and it shall be so stated on the face of said bonds. [Acts 1937, ch. 248, § 15; C. Supp. 1950, § 3695.41 (Williams, § 3695.40).]

#### NOTES TO DECISIONS

##### *1. Constitutionality.*

The provision of this section exempting a public utility district created under the authority of this chapter from taxation is not unconstitutional as being in contravention of Const., Art. 2, § 28 but falls within the exception of that section permitting the exemption from taxation of property "such as may be held by the state, by counties, cities or towns, and used exclusively for public or corporation purposes." First Suburban Water Utility Dist. v. McCanless (1941), 177 Tenn. 128, 146 S. W. (2d) 948.

##### *2. —Right to Question.*

Where suit against a utility district involved no taxes against the

bonds of a utility district, the question of the constitutionality of the provisions of this section exempting such bonds from taxation could not be properly raised. First Suburban Water Utility Dist. v. McCanless (1941), 177 Tenn. 128, 146 S. W. (2d) 948.

##### *3. Sales and Use Taxes.*

Merchandise purchased by suburban utility district was exempt from sales and use taxes since the effect of collecting such taxes would amount to a direct tax levied by the state on revenue exempt from taxation by the express terms of this section. Madison Suburban Dist. v. Carson (1950), 191 Tenn. 300, 232 S. W. (2d) 277.

**6-2627. Chapter unaffected by other law.**—This chapter is complete in itself and shall be controlling. The provisions of any other law, general, special or local, except as provided in this chapter, shall not apply to a district incorporated hereunder; provided, that nothing in this chapter shall be construed as impairing the powers and duties of the department of health of this state. [Acts 1937, ch. 248, § 17; C. Supp. 1950, § 3695.43 (Williams, § 3695.42).]

## CHAPTER 27

### POWER DISTRICTS

#### SECTION.

- 6-2701. Short title.
- 6-2702. Definition of terms.

#### SECTION.

- 6-2703. Effect of incorporation.
- 6-2704. Creation on resolution of municipal governing body.

## TITLE 6—Municipal Corporations.

### CHAP 26—Utility Districts

**Amendments to THE UTILITY DISTRICT ACT OF 1937 Pocket Supplement, Vol. 2, TENN. CODE ANNOTATED Includes all amendments through 1967 General Assembly.**

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### CHAPTER 26

#### UTILITY DISTRICTS

##### SECTION.

- 6-2603. [Superseded.]
- 6-2604. Hearing and order of approval.
- 6-2607. District as municipality —Powers.
- 6-2608. Power to operate utilities.
- 6-2614. Terms of commissioners —Vacancies.
- 6-2615. Compensation of commissioners — Delegation of Records — Qualifications.
- 6-2619. Purposes for which bonds authorized.
- 6-2628. Districts in two or more counties—Petition.

##### SECTION.

- 6-2629. Commissioners representing two or more counties.
- 6-2630. Notice of hearing as to two or more counties—Address of district office.
- 6-2631. Terms of commissioners.
- 6-2632. Filing and publication of order as to two or more counties.
- 6-2633. Appeals as to districts in two or more counties.
- 6-2634. Vacancies in board.
- 6-2635. Financial statements in two or more counties.
- 6-2636. Powers of existing districts saved.

##### *6-2601. Short title.*

*Cited:* Weakley County Municipal Elec. System v. Vick (1957), 43 Tenn. App. 524, 309 S. W. (2d) 792; Crossville v. Middle Tennessee Utility Dist. (1961), 208 Tenn. 268, 345 S. W. (2d) 865; Whitehaven Utility Dist. of

Shelby County v. Ramsay (1964), \_\_\_ Tenn. \_\_\_, 387 S. W. (2d) 451; Pace v. Garbage Disposal Dist. of Washington County (1965), \_\_\_ Tenn. App. \_\_\_, 390 S. W. (2d) 461.

*6-2602. Petition for creation.*

NOTES TO DECISIONS

**1. Public Convenience and Necessity.**

Jurisdiction to determine whether public convenience and necessity requires that exclusive right of utility district to furnish services

be revoked rests in the county judge or chairman of the county in which the petition for incorporation was presented and granted. *Crossville v. Middle Tennessee Utility Dist.* (1961), 208 Tenn. 268, 345 S. W. (2d) 865.

*6-2603. [Superseded.]*

*Compiler's Note.* This section (Acts 1953, ch. 122, § 1; Williams, § 3695.27) is superseded by Acts

1955, ch. 275, § 1, set forth herein as §§ 6-2628 - 6-2635.

**6-2604. Hearing and order of approval.**—Upon receipt of such petition it shall be the duty of the county judge or chairman of the county court to fix a time and place for a public hearing upon the convenience and necessity of the incorporation of the district. The date of such hearing shall be not more than thirty (30) days after the receipt of the petition and its date, place and purpose shall be announced by the county judge or chairman of the county court in a notice published not more than fifteen (15) days nor less than seven (7) days prior to the date of the hearing in a newspaper of general circulation in the proposed district, or if there be no such newspaper, then by posting such notice in five (5) conspicuous public places within the boundaries of the proposed district. If at said public hearing the county judge or chairman of the county court finds (a) that the public convenience and necessity requires the creation of the district, and (b) that the creation of the district is economically sound and desirable, he shall enter an order of the court so finding, approving the creation of the district, designating it as "the

Utility District of \_\_\_\_\_ County, Tennessee," defining its territorial limits and appointing as commissioners of the district those persons nominated in the petition, of whom one (1) shall be appointed for a term of two (2) years, one (1) for a term of three (3) years, and one (1) for a term of four (4) years. Such

order shall be filed with the clerk of the court and entered on record.

On the issue of whether or not the public convenience and necessity requires the creation of the district, the county judge or chairman of the county court shall take into consideration the ability of an incorporated city or town to serve the area, and such city or town at the hearing may make known its intention to serve the area. In that event, the county judge or chairman of the county court shall suspend action on the petition for sixty (60) days. Within said sixty (60) days the city or town may submit to the county judge or chairman its plans for serving the area, including the specific area to be served, the facilities to be installed, the services to be supplied, and a time schedule for completing installation of facilities to provide the services, and the county judge or chairman, after considering such plans and hearing the views of the utility district's proponents thereon shall determine a reasonable time within which the city or town must provide the services. If either party thinks that the time is unreasonable, as determined by the county judge or chairman, an appeal may be taken as provided in § 6-2606, to determine said time. If the city or town fails to provide the services within the time so determined, the county judge or chairman, unless he decides that circumstances warrant an extension of time, may create the utility district, acting on the original petition, to serve such area as he decides it can reasonably be expected to serve. If no city or town presents such plans to the county judge or chairman within said sixty (60) days, the petition shall be acted upon as otherwise provided by law. [Acts 1937, ch. 248, § 2; C. Supp. 1950, § 3695.27; Acts 1959, ch. 166, § 1.]

*Section to Section Reference.*  
This section is referred to in  
§§ 6-2608, 6-2630.

#### 6-2606. *Appeal to circuit court.*

*Section to Section Reference.*  
This section is referred to in  
§ 6-2608.

## NOTES TO DECISIONS

### *1. Nature of Review.*

Aggrieved party did not have the right under this section to prosecute a broad appeal without a bill of exceptions or to a trial de novo in the circuit court. Griffitts v. Rockford Utility Dist. (1956), 41 Tenn. App. 653, 298 S. W. (2d) 33.

Mere fact that this section used the term "appeal" rather than terms "appeal in nature of writ of error" or "writ of error" would not be sufficient to indicate that

appellant was entitled to broad appeal. Griffitts v. Rockford Utility Dist. (1956), 41 Tenn. App. 653, 298 S. W. (2d) 33.

### *2. Aggrieved or Prejudiced Party.*

Where resident of proposed utility district failed to have himself formally made a party in county court and made no effort to introduce proof he was not an aggrieved party under this section. Griffitts v. Rockford Utility Dist. (1956), 41 Tenn. App. 653, 298 S. W. (2d) 33.

**6-2607. District as municipality—Powers.**—From and after the date of the making and filing of such order of incorporation, the district so incorporated shall be a "municipality" or public corporation in perpetuity under its corporate name and the same shall in that name be a body politic and corporate with power of perpetual succession, but without any power to levy or collect taxes. Charges for services authorized herein, shall not be construed as taxes. The powers of each district shall be vested in and exercised by a majority of the members of the board of commissioners of the district. So long as the district continues to furnish any of the services which it is herein authorized to furnish, it shall be the sole public corporation empowered to furnish such services in the district and no other person, firm or corporation shall furnish or attempt to furnish any of the said services in the area embraced by the district, unless and until it shall have been established that the public convenience and necessity requires other or additional services; provided, that this chapter shall not amend or alter §§ 6-308—6-319, as amended.

In counties having a population of 482,000 or more according to the federal census of 1950 or any subsequent federal census, in the event no affirmative action is taken by the newly formed utility district within one (1) year of the date of filing of order of incorporation, the chairman of the county court may hold a hearing, after notification of the duly appointed commissioners, and determine if the utility district is proceeding with

dispatch and diligence with its proposed program, and, should the chairman find to the contrary, he may revoke and cancel the order of approval and incorporation. Provided, further, that in the event such a utility district shall fail to render any of the services for which it was created within a period of four (4) years after the issuance of its order of incorporation; and Provided further, that in addition to failure to render such services within such period it has failed to acquire within such period any assets or facilities necessary for the accomplishment of its purpose, said order of incorporation shall be void ipso facto and such utility district shall no longer be deemed to exist. However, the foregoing provision shall not apply to any utility district whose continuing existence has been approved by order of the county judge or chairman of the county court in which the original order of approval was granted within one (1) year prior to March 25, 1963, and which district under the terms of the original order approving its creation must annually renew its petition for incorporation.

After one (1) year from the date of the filing of the order of incorporation of any utility, the name of said utility may be changed by the commissioners filing a petition with the county judge of the county wherein such order of incorporation was filed, setting forth the present name of the utility, the name to which the commissioners want to change and the reasons for such change. Upon good cause being shown, the county judge shall issue such order, which shall be filed with the clerk of the court and entered on record. [Acts 1937, ch. 248, § 3; C. Supp. 1950, § 3695.28; Acts 1959, ch. 224, § 1; 1959, ch. 327, § 1; 1963, ch. 160, § 1; 1963, ch. 305, § 1.]

*Section to Section Reference.*  
This section is referred to in  
§§ 6-318, 6-3715.

*Law Reviews.* Local Government  
Law—1962 Tennessee Survey (Gil-

bert Merritt, Jr.), 16 Vand. L. Rev.  
800.

*Cited:* Hamilton County v. Chat-  
tanooga (1958), 203 Tenn. 85, 310  
S. W. (2d) 153.

## NOTES TO DECISIONS

### ANALYSIS

2. Exclusive right to furnish service.
  3. Boundaries.
  4. Services.
  5. Modification of franchise—Review.
- 2. Exclusive Right to Furnish Service.**

Where utility district did not refuse service but terms on which service was offered was less advantageous than that which could be obtained from another source, chancery court had no authority to authorize applicant to obtain service from such other source. *Chandler Inv. Co. v. Whitehaven Utility Dist.* (1957), 44 Tenn. App. 1, 311 S. W. (2d) 603.

Where subdivision was within the territorial limits of utility district, builder of subdivision could not obtain right to contract with city instead of utility district for water service by declaratory judgment proceedings in chancery court, but sole recourse was to petition the quarterly county court under the provisions of this section. *Chandler Inv. Co. v. Whitehaven Utility Dist.* (1957), 44 Tenn. App. 1, 311 S. W. (2d) 603.

Utility district had exclusive right to distribute gas within city under the statute and it was immaterial that charter of city withheld right to grant an exclusive franchise. *Crossville v. Middle Tennessee Utility Dist.* (1961), 208 Tenn. 268, 345 S. W. (2d) 865.

Where utility district knowingly allowed city and county to construct sewer projects within its boundaries with full knowledge of its exclusive right to provide such services within its boundaries and delayed bringing suit for eight years, utility district's suit seeking exclusive right to provide utility services within its boundaries was barred by laches. *Whitehaven Utility Dist. of Shelby County v.*

*Ramsay* (1964), — Tenn. —, 387 S. W. (2d) 351.

**3. Boundaries.**

Where boundaries of utility district had been fixed by the legislature, court possessed no power to detach territory from such district in absence of special legislation. *Consolidated Gray-Fordtown-Colonial Heights Utility District of Washington and Sullivan Counties v. O'Neill* (1962), 209 Tenn. 342, 354 S. W. (2d) 63.

**4. Services.**

Even though court was without jurisdiction to detach territory from one utility district and add it to another, Supreme Court would remand suit to allow amendment of complaint for purpose of allowing proof as to whether utility district was rendering adequate services. *Consolidated Gray-Fordtown-Colonial Heights Utility District of Washington and Sullivan Counties v. O'Neill* (1962), 209 Tenn. 342, 354 S. W. (2d) 63.

Where evidence did not establish that garbage disposal district had failed to render adequate services or that petitioner for modification of franchise could supply garbage collection services county judge was without power to modify franchise or grant petitioner authority to collect garbage within the district. *Pace v. Garbage Disposal Dist. of Washington County* (1965), — Tenn. App. —, 390 S. W. (2d) 461.

**5. Modification of Franchise—Review.**

Action of county judge in granting modification of district's exclusive franchise was appealable to circuit court where it was reviewable as the action of an administrative body and would be sustained if supported by material evidence. *Pace v. Garbage Disposal Dist. of Washington County* (1965), — Tenn. App. —, 390 S. W. (2d) 461.

**6-2608. Power to operate utilities.**—Any district herefore or hereafter created under authority of this chap-

ter is empowered to conduct, operate and maintain a system or systems for the furnishing of water, sewer, sewage disposal, natural gas, artificial gas, police, fire protection, garbage collection and garbage disposal, street lighting, parks and recreational facilities, transit facilities, transmission of industrial chemicals by pipeline to or from industries or plants located within the boundary of the district, community antenna television service, except for community antenna television service in counties having a population of more than 60,000 but less than 60,100, according to the 1960 federal census, or two (2) or more of such systems, and to carry out such purpose it shall have the power and authority to acquire, construct, reconstruct, improve, better, extend, consolidate, maintain and operate such system or systems, within or without the district, and to purchase from, and furnish, deliver and sell to any municipality, the state, any public institution and the public, generally, any of the services authorized by this chapter; provided, that with respect to the conduct and operation of a police protection system nothing contained in this chapter shall be construed as meaning or intending any encroachment upon the police powers of the sheriff of any county in this state, but shall only empower the district to conduct and operate such police protection system when it is enabled to do so through legal arrangements with the sheriff of the county, and other constituted authorities, in a manner consistent with all provisions of the Constitution of Tennessee; and provided, further that the inclusion of the power of conducting and operating a police protection system as one of the purposes for which a district may be created, shall not in any wise affect the validity of this section the legislature hereby expressly declaring its purpose to enact the remainder of this section without the provision herein contained authorizing the conduct and operation of a police protection system if the inclusion of such provision should be held to be invalid. The term "transit facilities" shall include all real and personal property needed to provide public passenger transportation by means of trolley coach, bus, motor coach, or any combination thereof including ter-

rninal, maintenance and storage facilities. Such community antenna television service shall be limited to: (1) charging for wire or cable service only on the basis of fixed monthly charges and with no per program charges; (2) and for such wire or cable service only to programs transmitted from television stations licensed by the federal communications commission; (3) and for such wire or cable service only to programs broadcast free of charge to the entire viewing public; (4) and without altering any characteristic of the incoming signal other than its frequency and amplitude, including but not limited to altering the program content, including station breaks, by addition or deletion. Such community antenna television service shall include the right to acquire and hold such real and personal property as may be needed to accomplish the foregoing.

A system or facilities for "the transmission of industrial chemicals by pipeline," as used herein shall mean and include facilities or a system used or useful in the transmission by pipeline of industrial chemicals and related commodities, in liquid, gaseous, or solid form, including raw materials, processed products, or by-products, to or from plants or industries located within the boundary of the district, on an individual basis, or in company with other plants, and to or from docks, terminals or tank farms located within or without the boundary of the district, but within the same county. Such system or facilities shall include, but not be limited to, the pipelines, docks, terminals, tank farms, compressor stations, storage and temperature treatment facilities, rights-of-way, and together with all real and personal property and equipment appurtenant to, or useful in connection with, such facilities. Before any district shall be authorized to conduct, operate or maintain such system or facilities for transmission of industrial chemicals by pipeline, as provided hereby, the board of commissioners thereof, whether previously installed in such office or nominated only, shall submit a petition signed in their own names to the county judge or chairman of the county court in which the order approving the creation of the district was or shall be entered, whereupon

the county judge or chairman shall, upon notice published as provided by § 6-2604 and public hearing, determine whether or not the project so proposed will promote industry and develop trade to provide against low employment, and enter an order of the court so finding. On the issue of whether or not industry, trade and employment will be so promoted and developed, the county judge or chairman shall take into consideration the plants proposed to be served by the facilities for transmission of industrial chemicals by pipeline, but no project so proposed to be undertaken shall be found not to promote and develop industry, trade and employment for either of the following reasons: (1) that the project will provide service for a single plant; or (2) that the project will serve to maintain existing industry and employment rather than encourage new industry and additional employment. Any party in interest, including any subscriber to existing services of the district, shall have the right of appeal from said order as provided by § 6-2606, but no consent to the undertaking of such district services by any number of existing subscribers shall be required, the provisions of § 6-2609 notwithstanding.

Incorporated cities and towns having a population of 5,000 or over shall have the prior right as respects utility districts to extend water, sewer or other utilities in any territory within five (5) miles of their corporate limits; where an incorporated city or town has a population of less than five thousand (5,000), the limit shall be three (3) miles; provided, that this provision shall not apply within the boundaries of a utility district or to facilities heretofore extended by a utility district beyond its boundaries; and provided, further, that a utility district may extend water, sewer or other utility facilities into such an area through agreement with the city or town concerned. A city or town shall lose its prior right under the following conditions: (1) where an agreement cannot be reached, the utility district, by a resolution setting out the area to be served and the type of utility, shall notify the city or town of its intention to serve the area; (2) after receipt of such notice, the city or town

shall have sixty (60) days in which to adopt an appropriate ordinance or resolution determining to serve the area within a specified time; the utility district may within ten (10) days appeal to the county judge or chairman of the county court of the county in which the major part of the land area is located if it considers the time so determined is too long, whereupon the county judge or chairman after hearing both parties shall determine a reasonable time for the city or town to provide the services, and further appeal may be taken by either party as provided in § 6-2606 and (3) upon failure of the city or town to provide the services within the time so determined, the utility district shall be authorized to serve any part of the area not already served by the city or town.

Section 6-2619, authorizing the issuance of revenue bonds for the purpose of constructing, acquiring, reconstructing, improving, bettering or extending any facility or system authorized by this chapter, being "The Utility District Law of 1937," is hereby made applicable to any district undertaking to exercise the power conferred by this section to conduct, operate and maintain a system or facilities for the transmission of industrial chemicals by pipeline. [Acts 1937, ch. 248, § 5; 1947, ch. 76, § 2; C. Supp. 1950, § 3695.30; Acts 1951, ch. 262, § 2; 1957, ch. 128, § 1; 1959, ch. 166, § 2; 1961, ch. 216, § 1; 1963, ch. 98, § 1; 1963, ch. 372, § 1; 1965, ch. 87, §§ 2-4; 1965, ch. 182, § 1.]

*Amendments.* Acts 1965, ch. 87 amendment inserted the words, "transmission of industrial chemicals by pipeline to or from industries or plants located within the boundary of the district," after "transit facilities" in the first sentence of the first paragraph; inserted the present second paragraph; and added the final paragraph.

Acts 1965, ch. 182 deleted "except for community antenna tele-

vision services in counties having a population of more than 114,100 but less than 114,200, and" from between "service" and "except for" in the first sentence.

*Effective Dates.* Acts 1965, ch. 88, § 6. March 10, 1965.

Acts 1965, ch. 182, § 2. March 20, 1965.

*Section to Section Reference.* This section is referred to in § 6-604.

### NOTES TO DECISIONS

*Cross-Reference.* See notes to § 6-2607. Consolidated Gray-Fordtown-Colonial Heights Utility District of Washington and Sullivan Counties v. O'Neill (1962), 209 Tenn. 342, 354 S. W. (2d) 63.

**2. Exclusive Franchise.**

Where city carried on a water line operation outside city limits

under private contracts, as setting variable rates between individuals in the area and reserving right to discontinue service in a water shortage, it has no franchise sufficient to entitle it to question an exclusive franchise given to a water district. Johnson City v. Milligan Utility Dist. (1955), 38 Tenn. App. 520, 276 S. W. (2d) 748.

**6-2609. Subscribers' consent to new services.**

*Section to Section Reference.*  
This section is referred to in  
§ 6-2608.

**6-2610. Powers in carrying out purposes.**

*Cited:* Chandler Inv. Co. v. Whitehaven Utility Dist. (1957), 44 Tenn. App. 1, 311 S. W. (2d) 603.

**6-2611. Eminent domain.**

### NOTES TO DECISIONS

**1. Application.**

Where a public service corporation caused erosion of plaintiff's realty by releasing large amounts of water daily across his land, such amounted to the taking of a property right, the remedy for

which would be action under § 28 1423, with limitation as to time to sue for damages governed by § 23-1424, not under § 28-305. Murphy v. Raleigh Utility Dist. of Shelby County (1963), 218 Tenn. 228, 373 S. W. (2d) 455.

**6-2612. General implementing powers.**

*Cited:* Chandler Inv. Co. v. Whitehaven Utility Dist. (1957), 44 Tenn. App. 1, 311 S. W. (2d) 603.

**6-2613. Exemption from state regulation.**

*Cited:* Chandler Inv. Co. v. Whitehaven Utility Dist. (1957), 44 Tenn. App. 1, 311 S. W. (2d) 603.

**6-2614. Terms of commissioners — Vacancies.** — The terms of office of the members of the board of commis-

sioners first appointed shall be two (2), three (3) and four (4) years respectively from date of appointment and thereafter the term of office of the members shall be four (4) years. Members shall hold office until their successors are elected and qualify. Any vacancy shall be filled and new commissioners shall be elected or old commissioners shall be re-elected upon the expiration of any term of office by vote of the other commissioners then in office. In the event the two (2) commissioners cannot agree upon a new commissioner to fill any vacancy, they shall certify that fact to the county judge or chairman of the county court within thirty (30) days of the date upon which such vacancy occurs, and, thereupon, within ten (10) days the county judge or chairman of the county court shall appoint a third commissioner to fill such vacancy. Provided, however, that in counties having a population of 482,000 or more according to the federal census of 1950 or any subsequent federal census the three (3) commissioners shall be appointed for terms to run until the first of the month following the next regular general county election and at the next regular general county election one (1) shall be elected by the qualified voters living within the boundaries of the district for a term of two (2) years, one for a term of four (4) years and one for a term of six (6) years. After that, there shall be elected at the regular general election held in the county each two (2) years, a commissioner for a full term of six (6) years. All qualified voters living in the boundaries of the utility district shall be eligible to vote for such commissioners. Candidates for office as commissioner shall qualify with the county election commission at least forty-five (45) days before the date of the election, provided, further, that all utility districts in existence in any such county on March 20, 1959 shall proceed to elect their commissioners in the same manner as above provided for new utility districts. [Acts 1937, ch. 248, § 4; C. Supp. 1950, § 3695.29; Acts 1959, ch. 266, § 1.]

*6-2615. Compensation of commissioners—Delegation of powers—Officers—Records—Qualifications.*—The members of the board, except as provided in the next para-

graph, shall serve without compensation for their services, but shall be entitled to reimbursement for all expenses incurred in connection with the performance of their duties. The board may delegate to one (1) or more of its members or to its agents and employees such powers and duties as it may deem proper, but at its first meeting and at the first meeting of each calendar year thereafter it shall elect one (1) of its members to serve as president, and another of its members as secretary of the commission. The secretary shall keep a record of all proceedings of the commission which shall be available for inspection as other public records, and shall be custodian of all official records of the district. Only persons resident in the district shall be eligible for election to the board.

Except as to counties having a population of not less than 41,000 nor more than 41,600 according to the federal decennial census of 1960 or any subsequent federal census, and except as to any utility district containing less than five (5) counties, the members of the board of commissioners shall be entitled to receive compensation for their services in an amount not to exceed twenty-five dollars (\$25.00) per day for each day's attendance of the meetings of said board in the performance of their official duties. The amount of compensation shall be fixed by the board of commissioners but the same shall not exceed the sum of twenty-five dollars (\$25.00) per day. Provided, however, that no member of a board of commissioners shall draw compensation in excess of three hundred dollars (\$300) for such services during any one calendar year. [Acts 1937, ch. 248, § 4; C. Supp. 1950, § 3695.29; Acts 1963, ch. 193, §§ 1, 2.]

*6-2616. Powers of commissioners.*

*Cited:* Chandler Inv. Co. v.  
Whitehaven Utility Dist. (1957),  
44 Tenn. App. 1, 311 S. W. (2d)  
603.

## NOTES TO DECISIONS

### *1. Power to Bind District.*

The commissioners act for and on behalf of the residents of the district and the bondholders and if they act within the apparent scope of their authority their acts or

omissions are binding on the utility district, the members and residents thereof and the bondholders. Whitehaven Utility Dist. of Shelby County v. Ramsay (1964), — Tenn. —, 387 S. W. (2d) 351.

### *6-2617. Publication of annual statement.*

*Section to Section Reference.*  
This section is referred to in  
§ 6-2635.

*6-2619. Purposes for which bonds authorized.*—Each district shall have power and is hereby authorized from time to time to issue its negotiable bonds in anticipation of the collection of revenues for the purpose of constructing, acquiring, reconstructing, improving, bettering or extending any facility or system authorized by this chapter, or any combination thereof, and to pledge to the payment of the interest and principal of such bonds all or any part of the revenues derived from the operation of such facility, system, or combination thereof. There may be included in the costs for which bonds are to be issued, reasonable allowances for legal, engineering and fiscal services, interest during construction and for six (6) months after the estimated date of completion of construction, and other preliminary expenses, including the expenses of incorporation of the district. [Acts 1937, ch. 248, § 9; C. Supp. 1950, § 3695.35 (Williams, § 3695.34); Acts 1951, ch. 262, § 3; 1963, ch. 104, § 1.]

*Cross-References.* Limitation of actions on bonds, § 28-313.

*Section to Section Reference.*  
This section is referred to in  
§ 6-2608.

*6-2623. Remedies of bondholders.*

NOTES TO DECISIONS

*2. Suit Requiring Furnishing of Service—Parties.*

Bondholders were not necessary parties to declaratory proceeding brought by builders of subdivision where bill asked that court determine the rights of complaint to contract for water service from a source other than the district or in the alternative that the district be

required to construct lines to the subdivision where the chancellor did not order the utility to build such lines, and if he did order the building of such lines would not have ordered them built out of revenues pledged to payment of bonds. *Chandler Inv. Co. v. Whitehaven Utility Dist.* (1957), 44 Tenn. App. 1, 311 S. W. (2d) 603.

*6-2627. Chapter unaffected by other law.*

*Law Reviews.* Local Government Law—1962 Tennessee Survey (Gilbert Merritt, Jr.), 16 Vand. L. Rev. 800.

NOTES TO DECISIONS

*1. Private Acts.*

This section superseded provision of private act incorporating city and it was immaterial whether

charter of city withheld from it the right to grant an exclusive franchise. *Crossville v. Middle Tennessee Utility Dist.* (1961), 208 Tenn. 268, 345 S. W. (2d) 865.

*6-2628. Districts in two or more counties—Petition.*—Utility districts embracing territory in two (2) or more counties may be created in the manner provided in this chapter. The petition for the incorporation of such utility district may be submitted to the county judge or chairman of the county court of any one (1) of the counties situated in whole or in part in such proposed district. [Acts 1955, ch. 275, § 1.]

*6-2629. Commissioners representing two or more counties.*—The commissioners nominated in such petition shall be designated in such a manner that each county situated in whole or in part in the proposed district shall be represented on the board of commissioners by at least one (1) resident of such county and of the district, and the judge or chairman shall appoint commissioners in like manner. If the proposed district is to comprise two (2) counties or parts thereof the petition shall nominate three (3) commissioners. If the proposed district is to comprise three (3) or more counties or parts thereof the petition shall nominate a number of commissioners equal to the number of counties or parts thereof to be

included in such district, provided, however, that where the proposed district is to comprise an even number of counties or parts thereof, the petition shall nominate a number of commissioners equal to the number of counties plus one (1) commissioner at large. If the proposed district is to comprise seven (7) or more counties or parts thereof, the petition shall nominate seven (7) residents of the district and it shall not be necessary for each county to be represented on the board, however each of the seven (7) commissioners shall be from separate counties, it being the purpose and intent hereof to limit the number of commissioners of any district to seven (7). [Acts 1955, ch. 275, § 1.]

*6-2630. Notice of hearing as to two or more counties—Address of district office.*—The notice of public hearing on the convenience and necessity of the incorporation of the district shall be published as provided in § 6-2604 in each of the counties situated in whole or in part in such proposed district in a newspaper published and having a general circulation therein. If there is no such newspaper in any of said counties, notice shall be given in such county or counties by posting as provided in § 6-2604. Such notice shall also be given by registered mail to the county judge or chairman of each county situated in whole or in part within such proposed district.

The petition for the incorporation of such utility district, the notice of public hearing thereon, and the order creating such district, in addition to other requirements of this chapter, shall state the address of the principal office of such utility district. [Acts 1955, ch. 275, § 1.]

*6-2631. Terms of commissioners.*—In cases where more than three (3) commissioners are nominated under the provisions of this chapter, such commissioners shall be appointed for terms of two (2), three (3) and four (4) years, the number of commissioners appointed for each such term to be as nearly equal as possible. [Acts 1955, ch. 275, § 1.]

*6-2632. Filing and publication of order as to two or more counties.*—A certified copy of the order creating such district shall be filed with the county court clerk

of each of the counties included in whole or in part in such district and shall be entered of record. A copy of such order shall also be published in each of the counties situated in whole or in part within such district in a newspaper published and having a general circulation in such county, or if there is no such newspaper in any such county a copy of the order shall be posted in five (5) conspicuous public places within such county. A certified copy of such order shall also be filed with the secretary of state in the state of Tennessee. Upon such filing and publication and/or posting, the incorporation of such district shall be complete. [Acts 1955, ch. 275, § 1.]

*6-2633. Appeals as to districts in two or more counties.*—Appeals from an order creating such a district may be prayed as provided in this chapter to the circuit court of any county included in whole or in part in such district. [Acts 1955, ch. 275, § 1.]

*6-2634. Vacancies in board.*—Any vacancy in the board of commissioners shall be filled by the remaining commissioners as provided in this chapter by electing a resident of the county from which his predecessor was appointed or elected, provided that a commissioner at large may be elected from any county in the district. The office of any commissioner other than a commissioner at large shall become vacant if the incumbent ceases to reside in the county from which he was elected. [Acts 1955, ch. 275, § 1.]

*6-2635. Financial statements in two or more counties.*—Statements published pursuant to § 6-2617 shall be published in each of the counties situated in whole or in part in such district in a newspaper having general circulation therein. [Acts 1955, ch. 275, § 1.]

*6-2636. Powers of existing districts saved.*—It is expressly the legislative intent that nothing in §§ 6-2628—6-2635 shall be construed to be retroactive and that the terms and conditions of said sections will in no wise affect or abridge the rights, powers, privileges and duties of utility district existing March 21, 1955. [Acts 1955, ch. 275, § 2.]

\* \* \* \*

**EMPLOYER'S OFFICIAL EXHIBIT NO. 2**

J. B. Howe,  
County Judge

Verdie G. Payne,  
Deputy Clerk

J. O. Phillips,  
County Attorney

Shirley R. Morelock,  
Deputy Clerk

**HAWKINS COUNTY COURT**

Dennie Payne, Clerk  
ROGERSVILLE, TENN. 37857

STATE OF TENNESSEE )  
HAWKINS COUNTY )

I, Dennie Payne, County Court Clerk of the above named State and County, do hereby certify the within to be a true and perfect copy of the Petition as filed in my office on December 4, 1957, asking for a hearing to be set for the purpose of the creation of a Utility District known as "THE NATURAL GAS UTILITY DISTRICT OF HAWKINS COUNTY TENN." as provided by Sections 6-2601 - 6-2636 of the Tennessee Code Annotated.

Given under my hand and seal in office at Rogersville, Tennessee, this the 19th day of June, 1967.

/s/ Dennie Payne  
County Court Clerk  
Hawkins County, Tennessee

TO THE HONORABLE JOHN K. WILLIAMS,  
CHAIRMAN OF THE COUNTY COURT OF HAWK-  
INS COUNTY, TENNESSEE.

The ex parte petition for the creation of a utility district, as provided by Sections 6-2601 - 6-2636 of the Tennessee Code Annotated.

YOUR PETITIONERS, WHOSE NAMES ARE SUB-  
SCRIBED BELOW, RESPECTFULLY SHOW TO THE  
COURT:

1.

Each of the petitioners are legal residents, within the boundaries of the proposed utility district as hereinafter described, and the owners of real estate therein.

2.

The utility district proposed to be created hereby intends to serve its area with natural gas, which is not now available therein. Said district will serve as a distributor and retailer of natural gas.

3.

The proposed corporate name of said district is "THE NATURAL GAS UTILITY DISTRICT OF HAWKINS COUNTY, TENN.", and its boundaries shall be the entire area of Hawkins County, Tenn. (excluding, however, the areas encompassed by the territorial boundaries of three existing utility districts within said County, namely, (a) First Utility District of Hawkins County, Tenn., (b) Bulls Gap Utility District of Hawkins County, Tenn., & (c) Surgoinsville Utility District of Hawkins County, Tenn.).

4.

The estimated cost of the construction of the facilities of said district is the sum of one million dollars (\$1,000,000.00).

## 5.

he following named persons, residents of said District, are hereby nominated as commissioners of the District:

Robert S. Lane	—Term of two years
Lance Rogan	—Term of three years
George O. Baker	—Term of four years

WHEREFORE, PREMISES CONSIDERED, PETITIONERS PRAY:

- 1 That said Utility District be created, after a public hearing, as provided by law.
- 2 That the aforesaid persons be named as commissioners of the District.
- 3 And for general relief.

(Name)	(Address)
s) C. C. Johnson, M.D.	Rogersville, Tenn.
s) W. F. Phipps	Rogersville, Tenn.
s) Owen K. Alley	Rogersville, Tenn.
s) Jack A. Cooter	Rogersville, Tenn.
s) Reid Terry	Rogersville, Tenn.
s) Fred Harrison	Rogersville, Tenn.
s) E. M. Henderson, M.D.	Rogersville, Tenn.
s) (Not legible)	Rogersville, Tenn.
s) George L. Googe	Pressmen's Home
s) Thos. E. Dunwody	Pressmen's Home
s) Howard Sullivan	Pressmen's Home
s) Lon R. Beale	110 Main St. Rogersville, Tenn.
s) J. S. Lyons, M.D.	Rogersville, Tenn.
s) James O. Phillips, Jr.	626 E. Main Rogersville, Tenn.
s) (Not legible)	
s) W. H. Lyons, M.D.	Rogersville, Tenn.
s) Hiram D. Heck	Rogersville, Tenn.
s) (Not legible)	Rogersville, Tenn.
s) (Not legible)	Rogersville, Tenn.
s) John E. Beal	Rogersville, Tenn.

(Name)	(Address)
(s) (Not legible)	Rogersville, Tenn.
(s) (Not legible)	Rogersville, Tenn.
(s) (Not legible)	Rogersville, Tenn.
(s) Joe A. Chambers	Rogersville, Tenn.
(s) Robert L. Ring	Rogersville, Tenn.
(s) M. B. Jones, Sr.	Rogersville, Tenn.
(s) Tom H. Rogan	Rogersville, Tenn.
(s) Dan Anderson	Rogersville, Tenn.
(s) Arthur Lyons	Rogersville, Tenn.
(s) Robert C. Armstrong, Jr.	Rogersville, Tenn.
(s) (Not legible)	Rogersville, Tenn.
(s) John Dalton	Rogersville, Tenn.
(s) Paul Greene	Rogersville, Tenn.
(s) Kenneth Honder	Rogersville, Tenn.
(s) (Not legible)	Rogersville, Tenn.
(s) (Not legible)	Rogersville, Tenn.
(s) Ernest Henderson	Rogersville, Tenn.
(s) J. H. McDonald	Rogersville, Tenn.

**EMPLOYER'S OFFICIAL EXHIBIT NO. 3**

J. B. Howe,  
County Judge

Verdie G. Payne,  
Deputy Clerk

J. O. Phillips,  
County Attorney

Shirley R. Morelock,  
Deputy Clerk

**HAWKINS COUNTY COURT**  
Dennie Payne, Clerk  
ROGERSVILLE, TENN. 37857

STATE OF TENNESSEE )  
HAWKINS COUNTY )

I, Dennie Payne, County Court Clerk of the above named State and County, do hereby certify the within to be a true and perfect copy of the ORDER creating a Natural Gas Utility District for Hawkins County, Tennessee, as it appears of record in this office in Quorum Book #11. Page 347, and bearing date of December 16, 1957.

Given under my hand and seal this June 19, 1967.

/s/ Dennie Payne  
County Court Clerk  
Hawkins County, Tennessee

IN RE: THE NATURAL GAS UTILITY DISTRICT  
OF HAWKINS COUNTY, TENNESSEE.

*Before* John K. Williams  
Chairman of the County Court  
of Hawkins County, Tennessee

ORDER

This matter came on to be heard before the Honorable John K. Williams, Chairman of the County Court of Hawkins County, Tennessee, on this 16th day of December, 1957, pursuant to a petition duly filed with the undersigned by more than twenty-five (25) owners of real property residing within the boundaries of the proposed Utility District, for the creation of a Utility District in accordance with the provisions of Sections 6-2601 - 6-2636 of the Tennessee Code as amended.

After hearing the evidence, and upon due consideration thereof, it satisfactorily appears that the public convenience and necessity requires the creation of the proposed Utility District, and that the creation of the District is economically sound and desirable. It is accordingly ordered and adjudged that The Natural Gas Utility District of Hawkins County, Tennessee, is hereby created.

The boundaries of said Utility District shall be:

The entire area of Hawkins County, Tennessee, (*excluding*, however, the areas encompassed by the territorial boundaries of three existing Utility Districts within the same county, namely: First Utility District of Hawkins County, Tennessee; Bulls Gap Utility District of Hawkins County, Tennessee; and Surgoinsville Utility District of Hawkins County, Tennessee).

The following persons are hereby appointed as Commissioners of said Utility District for the terms set opposite their respective names:

Robert S. Lane	2 years
Lance Rogan	3 years
George O. Baker	4 years

The costs of this proceeding, including the cost of publication of notice of this hearing, are hereby taxed against the several petitioners.

The Clerk of the County Court shall enter this order upon his records.

/s/ John K. Williams  
Chairman of the  
County Court of  
Hawkins County, Tennessee

**DECISION AND DIRECTION OF ELECTION**  
**(Case No. 10-RC-7070)**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before George L. Card, Jr., Hearing Officer. Thereafter, the Employer and the Petitioner filed brief.

The National Labor Relations Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, the National Labor Relations Board finds:

1. The Employer, also referred to as the District, moved to dismiss the petition on grounds that, as an exempt political subdivision of the State of Tennessee, the Board may not assert jurisdiction herein. In rejecting this contention, we find that the Employer is not a political subdivision within the meaning of Section 2(2) the National Labor Relations Act, as amended.<sup>1</sup>

<sup>1</sup> Section 2(2) reads in material part: "The term 'employer' . . . shall not include . . . any State or political subdivision thereof . . ."

In this connection, the facts show that the Employer was incorporated in December 1957 under the provisions of the Tennessee Utility District Act and is engaged in the sale and distribution of natural gas to residential houses, commercial businesses, and industrial firms, all of which are located within Hawkins County, Tennessee.

The Respondent is organized to supply gas utility service without pecuniary profit. The Respondent conducts its business without supervision of the State or any political subdivision thereof. It hires its own employees, and sets their terms and conditions of employment. It also has the usual powers of a private corporation, e.g., it may sue and be sued, incur obligations, issue bonds, sell and encumber its property, and enter into contracts necessary or convenient to the exercise of the powers granted to it.

The Respondent contends, however, that it is not the customary public utility inasmuch as the Tennessee statute under which it is organized specifically declares that a utility district is a "municipality" or "public corporation,"<sup>2</sup> and the Supreme Court of Tennessee has held that utility districts are "arms or instrumentalities" of

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<sup>2</sup> Tennessee Code, title 6, ch. 26, sec. 7, District as municipality—Powers.

From and after the date of the making and filing of such order of incorporation, the district so incorporated shall be a "municipality" or public corporation in perpetuity under its corporate name and the same shall in that name be a body politic and corporate with power of perpetual succession, but without any power to levy or collect taxes. Charges for services authorized herein, shall not be construed as taxes. The powers of each district shall be vested in and exercised by a majority of the members of the Board of commissioners of the district. So long as the district continues to furnish any of the services which it is herein authorized to furnish, it shall be the sole public corporation empowered to furnish such services in the district unless and until it shall have been established that the public convenience and necessity requires other or additional services. [Acts 1987, ch. 248, sec. 3; C. Supp. 1950, sec. 8695.28.]

the State of Tennessee.<sup>3</sup> However, while such state law declarations and interpretations are given careful consideration by the Board, they are not necessarily controlling.<sup>4</sup> Rather, the determination of whether a particular entity falls within the exemption for political subdivisions entails an assessment of all relevant factors. Upon examination of the instant record in the light of the "economic realities and statutory purposes,"<sup>5</sup> we are satisfied that the Employer exists as an essentially private venture, with insufficient identity with or relationship to the State of Tennessee to support the conclusion that it is an exempt governmental employer under the Act. Thus, unlike the usual situation where jurisdiction has been declined on political subdivision grounds,<sup>6</sup>

<sup>3</sup> First Suburban Water Utility Dist. v. McCanless, 177 Tenn. 128, 146 S. W. 2d 948 (1941).

<sup>4</sup> In N.L.R.B. v. Randolph Electric Membership Corporation and N.L.R.B. v. Tri-County Electric Membership Corporation, 343 F.2d 60, 62 (C.A. 4), the Court, in sustaining the Board's finding that the companies were not "political subdivisions" despite the State legislature's declaration to the contrary and similar interpretations by State Attorney Generals, held:

In the absence of a plain indication to the contrary, however, it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on State law.

In accord: N.L.R.B. v. Hearst Publications, 322 U.S. 111, 123 (1944), ". . . Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by . . . varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective States may see fit to adopt for the disposition of unrelated, local problems."

<sup>5</sup> See Randolph, *supra*, at p. 62.

<sup>6</sup> See, e.g., Mobile Steamship Association, et al., 8 NLRB 1297, where the State Docks Commission, one of the employers, was created by specific legislation of the State of Alabama; Oxnard Harbor District, 34 NLRB 1285, a harbor district organized by district residents under a general enabling act of California, but governed by a board of commissioners elected for a term of office by qualified voters of the district; New Jersey Turnpike Authority, 2-RC-2245, April 16, 1954, an authority specifically created by the Legislature and governed by members appointed by the Governor with advice and consent of the Senate; New Bedford, Woods Hole,

the Employer in this case is neither created directly by the State,<sup>7</sup> nor administered by State-appointed or elected officials.<sup>8</sup> Furthermore, its operations and services do not differ significantly from those of enterprises in private industry including utilities whose employees are entitled to the benefits of the Act. The Employer is completely autonomous in the conduct of its day-to-day affairs, with the State exercising no supervisory role with respect thereto, or reserving any power to remove or otherwise discipline those responsible for the Employer's operations. In these circumstances, we are satisfied that the State pronouncements are not determinative of the public nature of the Employer's functions and activities. We are also not persuaded that mere possession of the power of eminent domain which, as here, has been conferred in aid of a venture which is essentially private in nature, requires us to find that the Employer constitutes a political subdivision under Section 2(2) of the Act. In this regard, we think it significant that legislatures have frequently delegated such power to nonexempt privately-owned and operated service corporations.<sup>9</sup> Indeed,

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Martha's Vineyard, and Nantucket Steamship Authority, 127 NLRB 1322, a body corporate created by Massachusetts, consisting of members appointed and removed by the Governor with the advice and consent of the Executive Council.

<sup>7</sup> The Utility Districts are not created directly by the State. They are formed by petition of property owners upon a County Judge's determination of the feasibility thereof. Thus, the District is no more a direct creation of the State than such privately-owned public service companies as railroads, and motor carriers, which also require some form of governmental approval, such as a certificate of convenience and necessity.

<sup>8</sup> The County Judge exercises no independent discretion in naming the members of the Board of Commissioners. He must by statute appoint those persons nominated in the petition seeking formation of a district.

<sup>9</sup> N. C. Public Service Co. v. Southern Power Co., 282 F.2d 837 (C.A. 4), writ of cert. denied, 263 U.S. 508; Whiting Mfg. Co. v. Carolina Aluminum Co., 207 N. C. 52, 175 S. E. 698; Berry v. Southern Pine Electric Power Assn., 222 Miss. 260, 76 So. 2d 212; Bookhart v. Central Electric Power Coop., 219 S. C. 414, 65 S. E.

the Tennessee Legislature itself has delegated such authority to private corporations.<sup>10</sup>

In these circumstances we find that the District is an Employer within the meaning of Section 2(a) of the National Labor Relations Act, as amended. Accordingly, and as the record shows and the parties agree that the Employer's operations satisfy the Board's commerce standards for public utilities, we find that the Employer is engaged in commerce within the meaning of the Act.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 8(6) and (7) of the Act.

4. In accordance with the parties' stipulation, we find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All pipe fitters employed at the Employer's Rogersville, Tennessee, operation, but excluding all other employees, office clerical employees, salesmen, warehousemen, professional employees, guards, and supervisors as defined in the Act.

#### DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for Region 10 shall direct and supervise the election, subject to the National Labor Relations Board Rules and Regulations. Eligible to vote are those in the unit who were employed during the

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<sup>10</sup> 781, as explained in *Black River Electric Coop. v. (not legible) Service Commission*, 238 S. C. 232, 120 S. E. 2d 6, 12; *Hagans v. Excelsior Electric Membership Corp.*, 207 Ga. 53, 60 S. E. 2d 162; *Alabama Power Co. v. Cullman County Electric Membership Corp.*, 234 Ala. 396, 174 So. 866.

<sup>10</sup> Tennessee Code, title 48, ch. 1, sec. 1, et seq.

payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.<sup>11</sup> Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, American Federation of Labor, Local Union No. 102.

Dated, Washington, D. C. Oct. 6, 1967.

Frank W. McCulloch, Chairman  
John H. Fanning, Member  
Gerald A. Brown, Member  
Howard Jenkins, Jr., Member  
National Labor Relations Board

(Seal)

<sup>11</sup> An election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 10 within 7 days after the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear Inc.*, 156 NLRB 1236.

**MOTION FOR FURTHER HEARING**

(Case No. 10-RC-7070)

Comes now the alleged employer, The Natural Gas Utility District of Hawkins County, Tennessee, and moves, as provided in the National Labor Relations Board Rules and Regulations, Series 8, Section 102.67 (j), for further hearing.

The Decision and Direction of Election of the National Labor Relations Board, dated October 6, 1967, is erroneous in that it affirms the Hearing Officer's ruling that the Board may assert jurisdiction. It is submitted the Utility District under Section 2(2) of the National Labor Relations Act, as amended, is a political subdivision of the State of Tennessee and is specifically exempt. This ruling has broad effect, there being numerous utility districts in this state.

Accordingly, motion is hereby made for further hearing on this entire jurisdictional matter, and that the order directing election be suspended until this motion is disposed of.

(s) Eugene Greener, Jr.  
22 South Second Street  
Memphis, Tennessee

(s) J. O. Phillips, Jr.  
Citizens Union Bank Building  
Rogersville, Tennessee  
Attorneys for The Natural Gas  
Utility District of Hawkins  
County, Tennessee

ORDER DENYING MOTION  
(Case No. 10-RC-7070)

On October 6, 1967, the National Labor Relations Board, asserting jurisdiction in the above-entitled case, issued a Decision and Direction of Election herein.

Thereafter, on October 19, 1967, the Employer filed with the Board a motion for further hearing on the jurisdictional issue, contending that it is a political subdivision of the State of Tennessee and, under Section 2(2) of the National Labor Relations Act, is specifically exempt from the Board's jurisdiction.

The Board having duly considered the matter,

It Is Hereby Ordered that the Employer's motion be, and it hereby is, denied as lacking in merit.

Dated, Washington, D. C., October 24, 1967.

By direction of the Board:

George A. Leet  
Associate Executive Secretary

Form NLRB-4279  
(2-66)

RC-RM-RD

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

TYPE OF ELECTION

(Check one)

- Consent Agreement
- Stipulation
- Board Direction
- RD Direction

(Also check box  
below where  
appropriate)

- 8(b) (7)

Case No. 10-RC-7070

THE NATURAL GAS UTILITY DISTRICT OF  
HAWKINS COUNTY, TENNESSEE, EMPLOYER

and

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES  
OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE  
UNITED STATES AND CANADA, AMERICA FEDERATION  
OF LABOR, LOCAL NO. 102, PETITIONER

CERTIFICATION OF REPRESENTATIVE

An election having been conducted in the above matter under the supervision of the Regional Director of the National Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that a collective bargaining representative has been selected; and no objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned by the National Labor Relations Board, IT IS HEREBY CERTIFIED that United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, American Federation of Labor, Local No. 102 has been designated and selected

by a majority of the employees of the above-named Employer, in the unit described below, as their representative for the purposes of collective bargaining, and that, pursuant to Section 9(a) of the Act as amended, the said organization is the exclusive representative of all the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

**UNIT:** All pipe fitters employed at the Employer's Rogersville, Tennessee, operation, but excluding all other employees, office clerical employees, salesmen, warehousemen, professional employees, guards, and supervisors as defined in the Act.

Signed at Atlanta, Georgia on the 6th day of November, 1967.

On behalf of

NATIONAL LABOR RELATIONS  
BOARD

/s/ Walter C. Phillips  
Regional Director, Region 10  
National Labor Relations Board

[NLRB SEAL]

J. O. Phillips, Jr.  
Attorney  
Citizens Union Bank Building  
Rogersville, Tennessee 37857

Allen M. Elliott  
Attorney  
Suite 1408  
Bank of Knoxville Building  
Knoxville, Tennessee 37902

The Natural Gas Utility District  
of Hawkins County, Tennessee  
203 South Depot  
Rogersville, Tennessee 37857

United Association of Journey-  
men and Apprentices of the  
Plumbing and Pipe Fitting In-  
dustry of the United States and  
Canada, American Federation  
of Labor, Local No. 102  
1216 Broadway, N. E.  
Knoxville, Tennessee 37917

William S. Pierce  
Regional Director  
Federal Mediation and  
Consiliation Service  
154 Peachtree-Seventh Building  
Atlanta, Georgia 30323

Form NLRB-501  
(2-67)

Form Approved  
Budget Bureau No. 64-R001.12

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST EMPLOYER

*Instructions: File an original and 4 copies of this charge with NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring*

Do Not Write in  
This Space

Case No.

10-CA-7213

Date Filed

1-10-68

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT
  - a. Name of Employer  
The Natural Gas Utility District of Hawkins County,  
Tennessee
  - b. Number of Workers Employed  
9
  - c. Address of Establishment (Street and number, city,  
State, and ZIP code)  
520 W. Main Street  
Rogersville, Tennessee 37857
  - d. Employer Representative to Contact  
Ernest P. West, Jr.
  - e. Phone No.  
456-8841
  - f. Type of Establishment (Factory, mine, wholesaler,  
etc.)  
Wholesale & retail distributor of appliances and  
natural gas
  - g. Identify Principal Product or Service  
Distribution of natural gas

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and 5  
(List subsections)

of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

The above-mentioned Employer has since Dec. 4, 1967, refused to bargain with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, American Federation of Labor, Local #102, the recognized bargaining agent of the Employees of its members, but by letter from the employers attorney, the Hon. J. O. Phillips, Jr., dated Dec. 7, 1967, has informed the Union that a Resolution has been passed by the members of the Board of the Employer, directing the employer not to bargain with this Union.

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the right guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge (If labor organization, give full name, including local name and number)

United Assn. of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, American Federation of Labor, Local No. 102

4a. Address (Street and number, city, State, and ZIP code)

1218 Broadway, N.E., Knoxville, Tennessee

4b. Telephone No.  
524-5806

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

**United Association of Journeymen and Apprentices  
of the Plumbing and Pipe Fitting Industry of the  
United States and Canada, American Federation of  
Labor, Local No. 102**

## **6. DECLARATION**

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ Allen M. Elliott Attorney for Local Union 102  
(signature of (Title, if any)  
representative or  
person filing charge)

**Address** 1516 Bank of Knoxville Bldg.  
Knoxville, Tenn. 37902

**524-7456**

(Telephone number) (Date)

**524-7456**

(Telephone number)

Jan. 8, 1968

(Date)

**Willfully False Statements on This Charge Can Be Punished By Fine and Imprisonment (U.S. Code, Title 18, Section 1001)**

COMPLAINT AND NOTICE OF HEARING  
(Case No. 10-CA-7213)

It having been charged by United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, American Federation of Labor, Local No. 102, herein called the Union, that The Natural Gas Utility District of Hawkins County, Tennessee, herein called Respondent, has engaged in, and is engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et seq., herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for the Tenth Region, issues this Complaint and Notice of Hearing pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended.

1.

A copy of the charge, filed on January 10, 1968, was served upon Respondent by registered mail on January 11, 1968.

2.

Respondent is, and has been at all times material herein, incorporated under the provisions of the Tennessee Utility District Act and maintains its principal office and place of business at Rogersville, Tennessee, where it is engaged in the sale and distribution of natural gas to residential houses, commercial businesses, and industrial firms located in Hawkins County, Tennessee.

3.

Respondent, during the past calendar year, which period is representative of all times material herein, in the course and conduct of its business operations purchased and received goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of Tennessee. During the same period Respondent received gross revenue in excess of \$250,000.

## 4.

Respondent is, and has been at all times material herein, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

## 5.

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

## 6.

All pipe fitters employed at the Respondent's Rogersville, Tennessee, operation, but excluding all other employees, office clerical employees, salesmen, warehousemen, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

## 7.

On October 27, 1967, in an election by secret ballot conducted under the supervision of the Regional Director for the Tenth Region of the Board, a majority of the employees in the unit described in paragraph 6 above, designated and selected the Union as their representative for the purposes of collective bargaining with Respondent with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

## 8.

On November 6, 1967, the Regional Director for the Tenth Region of the Board certified the Union as the exclusive collective bargaining representative of all the employees in the unit described in paragraph 6 above.

## 9.

At all times since November 6, 1967, the Union has been, and is, the representative of a majority of the employees in the unit described in paragraph 6 above, for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment, and, by virtue of Section 9(a) of

the Act, has been, and is, the exclusive representative of all the employees in said unit for the purposes of collective bargaining.

10.

On or about December 4, 1967, and at all times thereafter, the Union requested Respondent to bargain collectively with the Union as the exclusive representative of all employees in the aforesaid unit with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

11.

On or about December 7, 1967, and at all times thereafter, Respondent refused, and has continued to refuse, to bargain collectively with the Union as the exclusive bargaining representative of all the employees in the unit described in paragraph 6 above.

12.

The acts of Respondent alleged in paragraph 11 above constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Please Take Notice that on the 26th day of March, 1968, at 10:00 a.m., (Eastern Standard Time), in the Hawkins County Courthouse, Rogersville, Tennessee, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases as Taken from the Board's Published Rules and Regulations and Statements of Procedure, is attached.

You Are Further Notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and 4 copies of an

answer to said complaint within 10 days from the service thereof and that unless it does so, all of the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board.

Dated at Atlanta, Georgia, this 1st day of February, 1968.

(s) Walter C. Phillips  
Regional Director, Region 10  
National Labor Relations Board  
Room 701, 730 Peachtree Street, N.E.  
Atlanta, Georgia 30308

**ANSWER OF THE NATURAL GAS UTILITY DISTRICT OF  
HAWKINS COUNTY, TENNESSEE**

**(Case No. 10-CA-7213)**

Comes now The Natural Gas Utility District of Hawkins County, Tennessee and answers the Complaint filed herein against it as follows:

It denies that it has engaged in and is engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et seq., but, rather, it alleges that it is exempt from said Act for it is not an "employer" as defined therein, but is a political subdivision of the State of Tennessee.

It admits ¶ 1.

It admits ¶ 2 insofar as it goes but alleges that said paragraph is incomplete and inadequately outlines both its present functions and fails to include its possible additional functions such as providing water, fire, police services, etc.

It admits ¶ 3.

It denies ¶ 4 for the reason stated above; namely, that it is exempt from the National Labor Relations Act, as amended, since it is not an "employer" as defined therein.

It admits ¶ 5.

It denies ¶ 6 because whether there is an appropriate unit is irrelevant and inapplicable.

It admits the election and the result of same as set out in ¶ 7 but it denies that the Union is the bargaining representative of its employees or that it is required to bargain with the Union since it is exempt from the National Labor Relations Act, as amended, as pointed out above.

It admits that the regional director certified the Union as outlined in ¶ 8, as the exclusive bargaining representative but it denies that this action has any legal effect since it is exempt for the reason above set out.

It denies ¶ 9, 10 and 11 as far as it states or infers it has any duty to bargain with the Union, or that the Union is the representative of its employees under the provisions of the Act because respondent is exempt and not governed by the provisions of the Act.

It admits the Union requested that it bargained with it and that it refused to do so and continues to refuse to do so because it is not covered by the Act and it is exempt therefrom.

It denies ¶ 12.

Wherefore, Respondent Prays the Complaint filed herein against it be dismissed.

Buchignani & Greener

By (s) Eugene Greener, Jr.

(s) J. O. Phillips, Jr.

Attorneys for the Natural Gas  
Utility District of Hawkins  
County, Tennessee

Dated this 6th day of February, 1968.

PROPOSED STIPULATION OF FACT ON BEHALF OF THE  
NATURAL GAS UTILITY DISTRICT OF  
HAWKINS COUNTY, TENNESSEE

(Case No. 10-CA-7213)

The respondent, The Natural Gas Utility District of Hawkins County, Tennessee, proposes the following stipulation of fact:

**(A) History and Background**

Hawkins County, one of the 95 counties in Tennessee, contains an area of 480 square miles, and on and prior to December 16, 1957, it was largely a rural area, made up of a number of small farms. The population according to the 1960 census was 30,468.

In the year 1957, and for some time prior thereto, the price structure for agricultural products was such that a reasonable living could not be made upon most of the small farms within Hawkins County. Burley tobacco allotments were steadily being decreased, and this deprived farmers of a considerable portion of their one good "cash crop." Only fully mechanized, large farms could be operated at a fair profit which would support an average family of four. The result of this situation was that, at this time, the youth of the County were leaving the county just as soon as they finished high school or college, as there was no hope of employment for them at home. In order to prevent a sharp decline in population, and in order to maintain sufficient tax revenues to keep local governmental services (especially education) in line with prevailing standards, it became apparent that the County must obtain some industrial plants.

When industries were contacted, it was found that in most instances new factories will not be located in areas where natural gas is unavailable. An extensive effort was made to have this commodity distributed within the County by everyone possible, including a retailer operating in an adjoining county. Due to the financial problems involved, no one would undertake this. Also, none of the small towns of the County acting alone could be interested in

undertaking this function. So it was that, under the direction of the Hawkins County Chamber of Commerce, and with some assistance from the communities of Rogersville, Surgoinsville and Pressman's Home, and because it was learned that the Town of Oak Ridge, Tennessee had obtained natural gas in this same manner, The Natural Gas Utility District of Hawkins County, Tennessee was organized, under the provisions of The Utility District Act of 1937. This is only one of nearly 270 such utility districts in Tennessee, some of which provide each of the various services authorized by the Law (such as fire protection, police, water, sewerage disposal, etc.); some districts provide more than one of the foregoing services.

Although the Hawkins County Utility District was organized in 1957, it was not until 1962 that the District was able to obtain the necessary financing. In the interim, various sources were tried, including various U. S. Governmental agencies. In 1962, the firm of Hugo Marx & Co., of Birmingham, Ala. contracted to buy and re-sell the District's revenue bonds in the total amount of \$1,950,000, and did so buy and re-sell them.

Attached are the trust agreements dated May 9, 1962, Exhibit 1, between the District and the Birmingham Bank covering the outstanding bonds. The District is repeatedly referred to therein as "the Municipality." As long as bonds are outstanding, the flow of and use of its revenue is completely controlled by this agreement.

With the proceeds, the District did construct a natural gas distribution system, extending from Rogersville, north-easterly to Pressmen's Home (12 miles), and from Rogersville easterly to a point near the Sullivan County line (26 miles), the latter serving the communities of Surgoinsville, Church Hill and Mt. Carmel. Rural homes located in reasonable close proximity to the distribution lines are served throughout the County. The District now serves a total of approximately 975 residences, of which at least one-half would be considered as being rural homes.

Since the formation of the Utility District, and its commencing operations, the following industrial plants have been located within the County:

Kingsport Press	Approximate cost	\$20,000,000	Employees 350
Holliston Mills (2)	Approximate cost	\$30,000,000	Employees 510
Alladin Plastics	Approximate cost	\$ 2,000,000	Employees 90

All of these plants are served by the Utility District, and none of them would have been located within the County, had natural gas not been available for them.

The Utility District acting for the benefit of the community provides natural gas to heat the County Court house, to heat the Hawkins County Memorial Hospital, to heat homes within a Federal Low Rent Housing Project, to heat the National Guard Armory, located in the eastern end of the County, and has entered into an informal contract with Holston Army Ammunition Plant to provide gas for the boilers used at that installation.

#### (B) Formation of the District

The enabling legislation for formation of utility districts, such as the one here involved and of which there are many in Tennessee was passed by the Tennessee State Legislature as the Act of 1937 and has subsequently been amended on several occasions. A copy of the amended act is attached as Exhibit 2.

The purpose of this legislation was to provide a municipal corporate arrangement to furnish certain needed services, usually in small towns and rural areas, including, but not limited to, the furnishing of water, sewer, sewerage disposal, fire protection, police protection, natural gas, etc. which services were not otherwise provided. The district when formed was given an exclusive franchise to provide one or more of the foregoing services.

Section 6-2602 T.C.A. provides that a petition for the incorporation of a utility district may be submitted to the county judge or the county court of any county in which the proposed district is situated; the petition should be signed by not less than twenty-five (25) owners of real property, residing within the boundaries of the district, and said petition should include a statement of the necessity for the service or services, the proposed corporate name and boundaries, an estimate of the cost of acquisi-

tion or construction of the facilities, and the nomination of three residents for appointment as commissioners.

It was under this provision in the County Court of Hawkins County, Tennessee, on December 16, 1957, that the order was entered for the creation of The Natural Gas Utility District of Hawkins County, Tennessee, by the Honorable John K. Williams, Chairman of the County Court, he having been elected by the public.

A copy of the petition and the order are attached, as Exhibits 3 and 4, after the filing of the petition and the holding of the hearing on December 16, 1957, after due notice, the Hawkins County judge determined (a) that the public convenience and necessity required the creation of the District, and (b) that the creation of the District was economically sound and desirable. Thereafter, he appointed the original commissioners.

#### (C) The Commissioners, Their Terms and Compensation

The three original commissioners were appointed by the Chairman of the County Court of Hawkins County, an elected public official. They were:

George O. Baker  
Robert S. Lane  
Lance W. Rogan

Mr. Baker was the Director of the Technical Trade School for the International Printing Pressmen & Assistant's Union at Pressmen's Home. Mr. Lane is a banker, Mr. Rogan is an automobile dealer.

Mr. Baker later resigned as Commissioner, and by vote of the two remaining commissioners was replaced by Mr. Howard Sullivan (then Director of the Technical Trade School for I.P.P. & A. U. of N.A.).

Mr. Sullivan was moved to Washington, D.C. He then resigned, and was, by vote of the remaining commissioners, replaced by Byron D. Rogers, the owner of a hardware store at Church Hill.

The present commissioners are:

Lance W. Rogan, Chairman  
Robert S. Lane, Secy-Treas.  
Byron D. Rogers

None of these men derives any direct financial gain from the affairs of the District. They serve at a personal loss, and from a sense of civic responsibility, their only compensation being \$25 per day subject to an annual maximum of \$300—they are also reimbursed for their expenses.

Further, Section 6-2614 T.C.A. provides that the remaining Commissioners fill any vacancies but in the event the remaining Commissioners cannot agree on a successor, the County Judge (an elected official) will appoint same.

#### (D) Powers and Attributes of District

Of special significance is the following which is a direct quotation from the statute 6-2607 T.C.A.:

*"District as Municipality—Powers. From and after the date of the making and filing of such order of incorporation, the district so incorporated shall be a 'municipality' or public corporation in perpetuity under its corporate name and the same shall in that name be a body politic and corporate with power of perpetual succession, but without any power to levy or collect taxes. Charges for services authorized herein, shall not be construed as taxes. The powers of each district shall be vested in and exercised by a majority of the members of the board of commissioners of the district. So long as the district continues to furnish any of the services which it is herein authorized to furnish, it shall be the sole public corporation empowered to furnish such services in the district and no other person, firm, or corporation shall furnish or attempt to furnish any of the said services in the area embraced by the district, unless and until it shall have been established that the public convenience and necessity requires other or additional services."* (Emphasis added.)

Further, Section 6-2608 T.C.A. gives to a district the power to operate utilities and "to carry out such purposes it shall have the power and authority to acquire, construct, reconstruct, improve, better, extend, consolidate, maintain and operate such system or systems, within

or without the district, and to purchase from, and furnish, deliver and sell to any municipality, the state, any public institution and the public, generally, any of the services authorized by this chapter."

Further, Section 6-2610 T.C.A. outlines various other powers of a utility district, including, but not limited to:

- (a) The power to sue and be sued;
- (b) The power to acquire by various methods, hold and dispose of real and personal property;
- (c) The power to make and enter into contracts, conveyances, etc.;
- (d) The power to incur debts;
- (e) The power to borrow money;
- (f) The power to fix, maintain, collect and revise rates and charges;
- (g) The power to pledge all or part of its revenues;
- (h) And various other powers, including specifically the right of eminent domain, with same even extending to other public agencies. Respondent's regular station sites were only obtained after threat of eminent domain proceedings.

Section 6-2613 T.C.A. specifically exempts a district from state regulation, either by the Railroad & Public Utilities Commission or any other board or commission of like character. It should be pointed out that private utilities are specifically subject to such regulation.

Section 6-2615 T.C.A. provides as follows:

"The secretary shall keep a record of all proceedings of the commission which shall be available for inspection as *other public records* and shall be custodian of all official records of the district." (Emphasis added.)

The terms of the board of commissioners and their powers as commissioners are set forth, including the power to subpoena witnesses and to administer oaths. They are much like a board of mayor and aldermen of a town, a legislative body.

Section 6-2617 T.C.A. requires the publication of the annual financial statement of the district in a newspaper of general circulation, published in the county in which the district is situated, showing the financial condition of the district at the end of the year and the earnings of the district during the year just ended and the rates then being charged. A procedure for protesting rates is established in 6-2618 T.C.A.

Section 6-2619 T.C.A. authorizes the issuance of revenue bonds. The bonds will be issued for periods not exceeding forty years, at rates of interest not exceeding 6% per annum, payable semiannually; said bonds will be fully negotiable.

Section 6-2626 T.C.A. provides that "So long as a district shall have the right to compel the levy of any tax to pay the bonds or the interest thereon and that the same are payable solely from revenue.

Section 6-26256 T.C.A. provides that "So long as a district shall own any system, the property and revenue of such system shall be exempt from all state, county and municipal taxation. Bonds issued pursuant to this chapter and the income therefrom shall be exempt from all state, county, and municipal taxation . . .".

In addition to the property and revenue of a utility district being exempt from state, county and municipal taxation, and the bonds issued and the income therefrom so exempt, utility districts on their purchases pay no state sales tax and obtain exemption certificates, as do other municipalities and political subdivisions of the state; and they may arrange to pay no state gasoline tax on the same basis. And "governmental service" vehicle license tags are obtained and used by respondent on its vehicles.

Further, the interest income on their bonds to the bondholder is free from federal income tax.

There is no provision whatever in the Utility District Act, which permits any distribution of profits to customers or subscribers. There are no stockholders to receive dividends. Since the District is a "municipality", as defined by the statute, there could be no "profits" as such from its operation, nor could there ever be any distribution of "earnings" or of "surplus funds." Under section

6-2625, the rates to be charged shall be such as shall reasonably pay operational expenses, and to pay bonds and interest. If and when the District should ever be able to retire its bonded indebtedness, the District's customers could then expect a reduction in rates.

#### (E) Other Applicable Statutes

No provision is made for unemployment compensation covering the employees of a district since it is a political subdivision of the state.

And furthermore, the only reason the employees are covered by social security is because under Federal statute, 42 USCA 418, and Tennessee statute 8-3811 T.C.A., provision is made for a voluntary agreement between the Secretary of Health, Education and Welfare and certain governmental entities to cover its employees. This voluntary coverage is available for employees of a state or political subdivision thereof. The respondent by resolution dated January 19, 1965, extended such coverage to its employees.

Certain other Tennessee statutes should be referred to because they characterize a utility district as a municipality and/or an instrumentality of the State of Tennessee.

In that regard, Section 6-318 T.C.A. entitled "Municipal Property and Services," reads in part as follows:

"Upon adoption of an annexation ordinance or upon referendum approval of an annexation resolution as hereinabove provided, an annexing municipality and *any affected instrumentality of the state of Tennessee, such as, but not limited to, a utility district, sanitary district, school district, or other public service district, shall attempt to reach agreement in writing for allocation and conveyance to the annexing municipality of any or all public functions, rights, duties, property, assets and liabilities of such state instrumentality that justice and reason may require in the circumstances . . .*" (Emphasis added.)

Further, Section 6-604 T.C.A. in the Municipal Corporations section provides that a county, utility district, mu-

nicipality or other agency conducting any utility service may extend the same beyond its boundaries. A utility district is thus characterized and given the same authority as a county, a municipality or other public agency.

Further, Section 9-1202 T.C.A. dealing with revenue bond refinancing, subsection (a) provides as follows:

"The term 'municipality' shall mean any county, city, town, township, utility, utility district, and sanitary district of this state."

The proposed stipulation is respectfully submitted this 8th day of February, 1968, on behalf of The Natural Gas Utility District of Hawkins County, Tennessee.

**BUCHIGNANI & GREENER**

By:

Eugene Greener, Jr.  
104 DuPont Bldg.  
Memphis, Tennessee

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J. O. Phillips, Jr.  
Citizens Union Bank Bldg.  
Rogersville, Tennessee

Attorneys for the Natural Gas  
Utility District of Hawkins  
County, Tennessee

**MOTION FOR SUMMARY JUDGMENT****(Case No. 10-CA-7213)**

Comes Now Counsel for the General Counsel and respectfully moves the National Labor Relations Board for summary judgment in the above-styled case, and in support thereof shows as follows:

**1.**

Upon a charge filed January 10, 1968, the Regional Director of the Tenth Region of the Board on February 1, 1968, issued a Complaint and Notice of Hearing in the above-styled case. Copies of said charge and Complaint and Notice of Hearing were duly served on the parties to this proceeding.

**2.**

Respondent, by Counsel, filed with the Regional Director of the Tenth Region an Answer to said Complaint on February 6, 1968, and served copies thereof on the parties herein.

**3.**

Respondent, by its Answer, admits paragraphs 1, 3 and 5 of the Complaint.

**4.**

Paragraph 2 of the Complaint alleges that Respondent is, and has been at all times material herein, incorporated under the provisions of the Tennessee Utility District Act and maintains its principal office and place of business at Rogersville, Tennessee, where it is engaged in the sale and distribution of natural gas to residential houses, commercial businesses, and industrial firms located in Hawkins County, Tennessee.

Respondent, by its Answer, admits the above allegation but contends that it inadequately outlines both Respondent's present functions and fails to include its possible additional functions such as providing water, fire, police services, etc.

In support of this allegation of the Complaint, Counsel for the General Counsel respectfully requests that the

Board take official notice of its Decision and Direction of Election in Case No. 10-RC-7070 dated October 6, 1967, and reported at 167 NLRB No. 100.

5.

Paragraph 4 of the Complaint alleges that Respondent is, and has been at all times material herein, engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Respondent denies this allegation and asserts that it is not an "employer" as defined in the Act.

In support of this allegation of the Complaint, Counsel for the General Counsel respectfully requests that the Board take official notice of its Decision and Direction of Election dated October 6, 1967, Respondent's Motion for Further Hearing, filed on October 19, 1967, and the Board's Order Denying Motion, dated October 24, 1967 in Case No. 10-RC-7070.

6.

Paragraph 6 of the Complaint alleges that all pipe fitters employed at the Respondent's Rogersville, Tennessee operation, but excluding all other employees, office clerical employees, salesmen, warehousemen, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. Respondent denies this allegation as being irrelevant and inapplicable.

In support of this allegation of the Complaint, Counsel for the General Counsel respectfully requests that the Board take official notice of its aforesaid Decision and Direction of Election in Case No. 10-RC-7070.

7.

Paragraph 7 of the Complaint alleges that on October 27, 1967, in an election by secret ballot conducted under the supervision of the Regional Director for the Tenth Region of the Board, a majority of the employees described in paragraph 6 of the Complaint, designated and selected the Union as their representative for the purposes of collective bargaining with Respondent with respect to rates

of pay, wages, hours of employment and other terms and conditions of employment. Respondent admits the results of the election as alleged, but denies that the Union is the bargaining representative of its employees with which it is required to bargain.

In support of this allegation of the Complaint, Counsel for the General Counsel respectfully requests that the Board take official notice of the Certification of Representative in Case No. 10-RC-7070 dated November 6, 1967.

8.

Paragraph 8 of the Complaint alleges that on November 6, 1967, the Regional Director for the Tenth Region of the Board certified the Union as the exclusive collective bargaining representative of all the employees in the unit described in paragraph 6 of the Complaint. Paragraph 9 of the Complaint alleges that at all times since November 6, 1967, the Union has been, and is, the representative of a majority of the employees described in paragraph 6 of the Complaint, for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment, and, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of all the employees in said unit for the purposes of collective bargaining. Respondent admits the certification of the Union, but asserts that it is exempt from any duty to bargain because it is exempt from the provisions of the Act.

In support of these allegations, Counsel for the General Counsel respectfully requests the Board to take official notice of the Certification of Representative in Case No. 10-RC-7070 issued on November 6, 1967 (copies of which were duly served on the parties herein).

9.

Paragraph 10 of the Complaint alleges that on or about December 4, 1967, and at all times thereafter, the Union requested Respondent to bargain collectively with the Union as the exclusive representative of all employees in the aforesaid unit with respect to rates of pay, wages,

hours of employment and other terms and conditions of employment.

In support of this allegation of the Complaint, Counsel for the General Counsel shows that Respondent, by its Answer, admits the Union requested that Respondent bargain with the Union and that the Union, by letter dated December 4, 1967, requested Respondent to bargain collectively. A copy of the letter (but not of the 8-page proposed working agreement attached to the original letter sent to the Respondent) is attached hereto as Exhibit 1.

10.

Paragraph 11 of the Complaint alleges that on or about December 7, 1967, and at all times thereafter, Respondent refused, and has continued to refuse, to bargain collectively with the Union as the exclusive bargaining representative of all the employees in the unit described in paragraph 6 of the Complaint.

In support of this allegation of the Complaint, Counsel for the General Counsel shows that Respondent, by its Answer, admits that it refused to bargain with the Union and continues to refuse to do so, and that Respondent, by letter dated December 7, 1967, refused to bargain with the Union. A copy of Respondent's letter dated December 7, 1967, is attached hereto as Exhibit 2.

11.

Paragraph 12 of the Complaint alleges that the acts of Respondent in paragraph 11 of the Complaint constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act. In support of this allegation Counsel for the General Counsel shows as follows:

Pursuant to a petition filed on April 4, 1967, in Case No. 10-RC-7070, a hearing was held before a Hearing Officer of the Board on June 19, 1967. The Hearing Officer, by direction of the Regional Director for the Tenth Region, signed an order transferring the case to the Board. The Respondent denied the Board's jurisdiction, contending that it was, and is, an exempt political sub-

division of the State of Tennessee. On October 6, 1967, the Board issued its Decision and Direction of Election in which jurisdiction was asserted. See 167 NLRB No. 100. On October 19, 1967, the Respondent filed with the Board a motion for further hearing on the jurisdictional issue. The Board, having duly considered the matter, denied the motion in an Order Denying Motion on October 24, 1967.

On October 27, 1967, pursuant to the Board's Decision and Direction of Election, an election by secret ballot was conducted resulting in a majority of the valid votes cast being for the Union. Whereupon, no objections having been filed to the conduct of the election, the Regional Director for the Tenth Region of the Board, on behalf of the Board, issued a Certification of Representative in Case No. 10-RC-7070 on November 6, 1967.

Following this certification as the exclusive bargaining representative of Respondent's employees in an appropriate unit, the Union, by letter dated December 4, 1967, requested Respondent to bargain collectively (See Exhibit 1). Respondent, by letter dated December 7, 1967, refused to bargain collectively with the Union (See Exhibit 2). Respondent, by its Answer, admits that the Union requested Respondent to bargain and that Respondent refused and continues to refuse to do so. Respondent's refusal to bargain with the Union is predicated solely on its denial of the Board's jurisdiction. Its denials of specific allegations in the Complaint are based on allegations that it is exempt from the Act, alleging that it is not an "employer" as defined in the Act, but a political subdivision of the State of Tennessee. Respondent denies any legal effect of the Board-conducted election or the Certification of Representative based thereon.

The Respondent is attempting to relitigate the issues raised in the representation proceedings. (Case No. 10-RC-7070). Counsel for the General Counsel submits that in the absence of newly discovered or previously unavailable evidence (not herein contended by Respondent) issues that were or could have been raised in the related representation proceedings may not be relitigated in an unfair labor practice proceeding. See Pittsburgh Plate

Glass Company v. NLRB, 313 U. S. 146; The Sheffield Corporation, 163 NLRB No. 34, and State Farm Mutual Automobile Insurance Company, 163 NLRB No. 94. Moreover, Section 102.67(f) of the Board's Rules and Regulations, Series 8, as amended, expressly precludes such relitigation.

Wherefore, Counsel for the General Counsel submits that there are no issues of fact or law requiring a hearing, and prays that the Board issue an Order that cause, if any there be, be shown why a Decision should not be issued finding the violations as alleged in the Complaint, and that such Decision be issued thereafter.

Dated at Atlanta, Georgia, this 13th day of February, 1968.

(s) Gerald S. Kiel  
Counsel for the General Counsel

**EXHIBIT I**

[LETTERHEAD OF UNITED ASSOCIATION OF  
JOURNEYMAN AND APPRENTICES OF THE  
PLUMBING AND PIPE FITTING INDUSTRY—  
LOCAL UNION No. 102]

Knoxville, Tennessee 37917  
December 4, 1967

Mr. Ernest P. West, Jr.  
Natural Gas Utility District  
of Hawkins County  
Rogersville, Tennessee.

Dear Sir:

I am enclosing herewith one (1) copy of the proposed working agreement for the Pipefitters working for the Natural Gas Utility District of Hawkins County, Rogersville, Tennessee.

If it is agreeable with you, I would like to have a meeting with you on Tuesday, December 12, 1967 at 2:00 P. M. there in your office in Rogersville. Please advise by return mail if you can meet with me on this date.

With best wishes I am,

Respectfully yours,

(s) H. G. Graham  
Business Agent  
Local No. 102

HGG:er  
opeiu  
#144  
afl-cio  
enc.

## EXHIBIT II

## [LETTERHEAD OF PHILLIPS &amp; HALE]

Attorneys and Counsellors  
Rogersville, Tennessee 37857

December 7, 1967

Mr. H. G. Graham  
Business Agent, Local No. 102  
United Association of Journeymen and  
Apprentices of the Plumbing & Pipe  
Fitting Industry  
1216 Broadway, N. E.  
Knoxville, Tennessee 37917

Dear Mr. Graham:

I have been asked to reply to your letter of December 4 to Mr. Ernest P. West, Jr., concerning a conference relating to a proposed contract between your Union and The Natural Gas Utility District of Hawkins County, Tennessee.

You will recall the discussion between you, Mr. Allen Elliott and I on the day of the representation election, in which I advised you of the possibility that the Utility District might seek an adjudication from the Sixth U. S. Circuit Court of Appeals, concerning its alleged exemption from the provisions of the Fair Labor Standards Act. As we understand it, the only way by which the matter can be presented to that court will be the result of the District's failure to enter into contract negotiations with your Union.

The Board of Commissioners of the Utility District passed a resolution directing that such adjudication be obtained, it still being their earnest contention that the Utility District is a political subdivision or municipality, within the meaning of the Fair Labor Standards Act. Accordingly, we are not at this time in position to enter into negotiations. I hope you will understand the spirit in which this letter is written. We wish that it were possible

to simply appeal from the ruling of NLRB, but such does not appear to be the case.

Yours very truly,

(s) J. O. Phillips, Jr.

JOPjr:mc

cc: Mr. Allen Elliott, Attorney

Mr. Lance Rogan

Mr. Robert S. Lane

Mr. Byron D. Rogers

Mr. Robert D. Bradley

Mr. L. E. Hoffmann

Mr. Ernest P. West, Jr.

Mr. V. Hugo Marx, Jr.

**ORDER TRANSFERRING PROCEEDING TO THE BOARD AND  
NOTICE TO SHOW CAUSE**

**(Case No. 10-CA-7213)**

On February 1, 1968, the Regional Director for Region 10 of the National Labor Relations Board issued a Complaint and Notice of Hearing in the above-entitled proceeding, alleging that the Respondent has engaged in, and is engaging in, certain acts which constitute unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended. Subsequently, the Respondent filed its answer, admitting in part, and denying in part, the allegations of the complaint, and requesting that the complaint be dismissed.

Thereafter, on February 16, 1968, the General Counsel filed with the Board in Washington, D. C., a Motion for Summary Judgment, in requesting that the Board take official notice of certain documents in Case No. 10-RC-7070. The General Counsel submits that the Respondent is attempting to relitigate issues which were raised and decided in Case No. 10-RC-7070, and that, therefore, there are no issues of fact or law requiring a hearing in the instant case. He requests "that the Board issue an Order

that cause, if any there be, be shown why a Decision should not be issued finding the violations as alleged in the Complaint, and that such Decision be issued thereafter."

The Board having duly considered the matter,  
It Is Hereby Ordered that the above-entitled proceeding be, and it hereby is, transferred to and continued before the Board.

Notice Is Hereby Given that cause be shown, in writing, filed with the Board in Washington, D. C., on or before March 5, 1968, (with affidavit of due service of copies upon the parties to this proceeding), why the General Counsel's Motion for Summary Judgment should not be granted.

Dated, Washington, D. C., February 19, 1968.  
By direction of the Board:

(s) George A. Leet  
Associate Executive Secretary

**RESPONSE TO NOTICE TO SHOW CAUSE****(Case No. 10-CA-7213)**

Comes now the Respondent, The Natural Gas Utility District of Hawkins County, Tennessee, and in response to the Notice to Show Cause why the Motion for Summary Judgment should not be granted shows as follows:

**I.**

It questions the jurisdiction of this Board.

It is basic Horn Book Law that jurisdiction may be raised at any time in any proceeding.

The foregoing basic rule has been repeatedly stated by courts at all levels including the U. S. Supreme Court, Gutierrez v. Waterman Steamship Corp., 373 U. S. 206, 209, (1962) citing numerous cases; Matson Navigation Co. v. United States, 284 U.S. 352, 359 (1931) citing many cases; Morris v. Gilmer, 129 U.S. 315, 327 (1888)—the Court on its own motion will consider whether or not there is jurisdiction. And as the United States Supreme Court said in Cardillo v. Liberty Mutual Co., 330 U.S. 469, 478:

"But in reviewing an administrative order, it is ordinarily preferable where the issue is raised and where the record permits an adjudication, for a federal court first to satisfy itself that the administrative agency or officer had jurisdiction over the matter in dispute."

It is, therefore, respectfully submitted that the cases cited in the Motion for Summary Judgment and the rule of the Board referred to against relitigation do not, in fact cannot, prevent a determination of lack of jurisdiction.

**II.**

It is not an "employer" as defined in section 2(2) of the National Labor Relations Act, but it is a political subdivision of the State of Tennessee. Further, the complaint filed by the Regional Director for Region 10, herein does not allege that Respondent is such an "employer".

III.

In support of this Response, there are attached hereto the following: (a) the affidavit of Eugene Greener, Jr. with Exhibit 1 to same being the conflicting decision of Region 2<sup>e</sup> of the Board rendered on September 1, 1967 that another Utility District is not an "employer" but is a political subdivision of Tennessee, and (b) affidavit of James O. Phillips, Jr., both affiants being members of the Tennessee Bar and (c) Points and Authorities on behalf of Respondent's position.

Respondent respectfully asks this Tribunal to reconsider the basic question of whether or not it has jurisdiction.

Respectfully submitted this 26th day of February, 1968.

The Natural Gas Utility District  
of Hawkins County, Tennessee

By (s) Eugene Greener  
Buchignanni & Greener  
104 DuPont Building  
22 S. 2nd Street  
Memphis, Tennessee

(s) J. V. Phillips  
Phillips & Hale  
Citizens Union Bank Building  
Rogersville, Tennessee

State of Tennessee )  
County of Shelby )

I, Eugene Greener, Jr., first being duly sworn make oath that copies of this Response have been this day mailed by regular United States mail with postage prepaid to the following:

1. Mr. Allen M. Elliott, Attorney  
1516 Bank of Knoxville Building  
Knoxville, Tennessee 37902
2. United Association of Journeymen and Apprentices  
of the Plumbing and Pipe Fitting Industry of  
the United States and Canada, American Feder-  
ation of Labor, Local No. 102  
1218 Broadway, N. E.  
Knoxville, Tennessee 37902
3. Mr. Walter C. Phillips  
Regional Director  
National Labor Relations Board  
Region 10  
Room 701, 730 Peachtree St. N. E.  
Atlanta, Georgia 30308

(s) Eugene Greener, Jr.

Sworn to and subscribed before me this 26th day of February, 1968.

My commission expires: 4-15-71.

(s) (Not Legible)  
Notary Public

**AFFIDAVIT OF EUGENE GREENER, JR.**

State of Tennessee )  
County of Shelby )

Comes Eugene Greener, Jr., and makes oath in due form of law as follows:

Affiant is 46 years of age, a resident of Memphis, Tennessee, and has been a member of the Tennessee Bar since 1948. He is presently and has been for a number of years a member of the Memphis law firm of Buchignani & Greener; he is quite familiar with the organizational set up and method of operation of a utility district in Tennessee, as authorized by the Utility District Law of 1937, duly passed by the Tennessee State Legislature and duly effective since 1937.

That Affiant has been involved in at least four litigated cases involving Utility Districts, including one NLRB Case other than the one herein involved, which litigated matters required a thorough examination of the method of establishment, the powers and responsibilities of such a utility district; that in case No. 26RC 2972 in which Affiant was counsel before the National Labor Relations Board (Regional Director, Region 26) on behalf of the West Tennessee Public Utility District of Weakly, Carroll and Benton Counties, Tennessee, by Decision and Order entered on September 1, 1967, it was held that the utility district in question was not an "employer" within the meaning of the Act, but was a political subdivision of the State of Tennessee. The facts in that case and the one at bar are substantially identical. A copy of that Decision and Order is attached hereto as Exhibit 1 to this affidavit.

Affiant would further show that Hawkins County is one of the 95 counties in Tennessee and that The Natural Gas Utility District of Hawkins County, Tennessee is only one of nearly 270 such utility districts in Tennessee, each of which provides one of the various services authorized by the law (such as fire protection, police, water, sewerage disposal, etc.); some districts provide more than one of the foregoing services.

### (A) Formation of the District

The enabling legislation for formation of utility districts, such as the one here involved and of which there are nearly 270 in Tennessee was passed by the Tennessee State Legislature as the Act of 1937 and has subsequently been amended on several occasions. A copy of the amended act is attached as Exhibit 2.

The purpose of this legislation was to provide a municipal corporate arrangement to furnish certain needed services, usually in small towns and rural areas, including, but not limited to, the furnishing of water, sewerage disposal, fire protection, police protection, natural gas, etc. which services were not otherwise provided. The district when formed was given an exclusive franchise to provide one or more of the foregoing services.

Section 6-2602 T. C. A. provides that a petition for the incorporation of a utility district may be submitted to the county judge or the county court of any county in which the proposed district is situated; the petition should be signed by not less than twenty-five (25) owners of real property, residing within the boundaries of the district, and said petition should include a statement of the necessity for the service or services, the proposed corporate name and boundaries, an estimate of the cost of acquisition or construction of the facilities, and the nomination of three residents for appointment as commissioners.

It was under this provision in the County Court of Hawkins County, Tennessee, on December 16, 1957, that the order was entered for the creation of The Natural Gas Utility District of Hawkins County, Tennessee, by the Honorable John K. Williams, Chairman of the County Court, he having been elected a member of the court by the public residing in the county.

A copy of the petition and the order are attached, as Exhibits 3 and 4, after the filing of the petition and the holding of the hearing on December 16, 1957, after due notice, the Hawkins County judge determined (a) that the public convenience and necessity required the creation of the District, and (b) that the creation of the

District was economically sound and desirable. Thereafter, he appointed the original commissioners.

#### (B) The Commissioners, Their Terms and Compensation

The three original commissioners were appointed by the Chairman of the County Court of Hawkins County, an elected public official. They were:

George O. Baker

Robert S. Lane

Lance W. Rogan

Mr. Baker was the Director of the Technical Trade School for the International Printing Pressmen & Assistant's Union at Pressmen's Home. Mr. Lane is a banker, Mr. Rogan is an automobile dealer.

Mr. Baker later resigned as Commissioner, and by vote of the two remaining commissioners, was replaced by Mr. Howard Sullivan (then Director of the Technical Trade School for I.P.P. & A. U. of N. A.).

Mr. Sullivan was moved to Washington, D. C. He then resigned, and was, by vote of the remaining commissioners, replaced by Bryon D. Rogers, the owner of a hardware store at Church Hill.

The present commissioners are:

Lance W. Rogan Chairman

Robert S. Lane, Secy-Treas.

Bryon D. Rogers

None of these men derives any direct financial gain from the affairs of the District. They serve at a personal loss, and from a sense of civic responsibility, their only compensation being \$25 per day subject to an annual maximum of \$300—they are also reimbursed for their expenses.

Further, Section 6-2614 T.C.A. provides that the remaining Commissioners fill any vacancies but in the event the remaining Commissioners cannot agree on a

successor, the County Judge (an elected official) will appoint same.

Among others served, The Natural Gas Utility District of Hawkins County, Tennessee provides natural gas to heat the County Court House, to heat the Hawkins County Memorial Hospital, to heat homes within a Federal Low Rent Housing Project, to heat the National Guard Armory, located in the eastern end of the County, and has entered into an informal contract with Holston Army Ammunition Plant to provide gas for the boilers used at that installation.

#### (C) Powers and Attributes of District

Of special significance is the following which is a direct quotation from the statute 6-2687 T.C.A.:

*"District as Municipality—Powers. From and after the date of the making and filing of such order of incorporation, the district so incorporated shall be a 'municipality' or public corporation in perpetuity under its corporate name and the same shall in that name be a body politic and corporate with power of perpetual succession, but without any power to levy or collect taxes. Charges for services authorized herein, shall not be construed as taxes. The powers of each district shall be vested in and exercised by a majority of the members of the board of commissioners of the district. So long as the district continues to furnish any of the services which it is herein authorized to furnish, it shall be the sole public corporation empowered to furnish such services in the district and no other person, firm, or corporation shall furnish or attempt to furnish any of the said services in the area embraced by the district, unless and until it shall have been established that the public convenience and necessity requires other or additional services." (Emphasis added.)*

Further, Section 6-2608 T.C.A. gives to a district the power to operate utilities and "to carry out such purposes it shall have the power and authority to acquire,

construct, reconstruct, improve, better, extend, consolidate, maintain and operate such system or systems, within or without the district, and to purchase from, and furnish, deliver and sell to any municipality, the state, any public institution and the public, generally, any of the services authorized by this chapter."

Further, Section 6-2610 T.C.A. outlines various other powers of a utility district, including, but not limited to:

- (a) The power to sue and be sued;
- (b) The power to acquire by various methods, hold and dispose of real and personal property;
- (c) The power to make and enter into contracts, conveyances, etc.;
- (d) The power to incur debts;
- (e) The power to borrow money;
- (f) The power to fix, maintain, collect and revise rates and charges;
- (h) The power to pledge all or part of its revenues;
- (i) And various other powers, including specifically the right of eminent domain, with same even extending to other public agencies. Respondent's regular station sites were only obtained after threat of eminent domain proceedings.

Section 6-2613 T.C.A. specifically exempts a district from state regulation, either by the Railroad & Public Utilities Commission or any other board or commission of like character. It should be pointed out that private utilities are specifically subject to such regulation.

Section 6-2615 T.C.A. provides as follows:

"The secretary shall keep a record of all proceedings of the commission which shall be available for inspection *as other public records* and shall be custodian of all official records of the district." (Emphasis added.)

The terms of the board of commissioners and their powers as commissioners are set forth, including the power to subpoena witnesses and to administer oaths. They are much like a board of mayor and alderman of a town, a legislative body.

Section 6-2617 T.C.A. requires the publication of the annual financial statement of the district in a newspaper of general circulation, published in the county in which the district is situated, showing the financial condition of the district at the end of the year and the earnings of the district during the year just ended and the rates then being charged. A procedure for protesting rates is established in 6-2618 T.C.A.

Section 6-2619 T.C.A. authorizes the issuance of revenue bonds. The bonds will be issued for periods not exceeding forty years, at rates of interest not exceeding 6% per annum, payable semiannually; said bonds will be fully negotiable.

Section 6-2624 T.C.A. provides that no bondholders shall have the right to compel the levy of any tax to pay the bonds or the interest thereon and that the same are payable solely from revenue.

Section 6-2626 T.C.A. provides that "So long as a district shall own any system, the property and revenue of such system shall be exempt from all state, county and municipal taxation. Bonds issued pursuant to this chapter and the income therefrom shall be exempt from all state, county, and municipal taxation . . ."

In addition to the property and revenue of a utility district being exempt from state, county and municipal taxation, and the bonds issued and the income therefrom so exempt, utility districts on their purchases pay no state sales tax and obtain exemption certificates, as do other municipalities and political subdivisions of the state; and they may arrange to pay no state gasoline tax on the same basis. And "governmental service" vehicle license tags are obtained and used by respondent on its vehicles.

Further, the interest income on their bonds to the bondholder is free from federal income tax.

There is no provision whatever in the Utility District Act, which permits any distribution of profits to customers or subscribers. There are no stockholders to receive dividends. Since the District is a "municipality", as defined by the statute, there could be no "profits" as such from its operation, nor could there ever be any dis-

tribution of earnings" or of "surplus" funds. Under section 6-2625, the rates to be charged shall be such as shall reasonably pay operational expenses, and to pay bonds and interest. If and when the District should ever be able to retire its bonded indebtedness, the District's customers could then expect a reduction in rates.

Attached are the trust agreements dated May 9, 1962, Exhibit 5, between the District and the Birmingham Bank, covering the outstanding bonds. The District is repeatedly referred to therein as "the Municipality." As long as bonds are outstanding, the flow of and use of its revenue is completely controlled by this agreement.

#### (D) Other Applicable Statutes

No provision is made for unemployment compensation covering the employees of a district since it is a political subdivision of the state.

And furthermore, the only reason the employees are covered by social security is because under Federal statute, 42 USCA 418, and Tennessee statute 8-3811 T.C.A., provision is made for a voluntary agreement between the Secretary of Health, Education and Welfare and certain governmental entities to cover its employees. This voluntary coverage is available for employees of a state or political subdivision thereof. The respondent by resolution dated January 19, 1965, extended such coverage to its employees.

Certain other Tennessee statutes should be referred to because they characterize a utility district as a municipality and/or an instrumentality of the State of Tennessee.

In that regard, Section 6-318 T.C.A. entitled "Municipal Property and Services," reads in part as follows:

"upon adoption of an annexation ordinance or upon referendum approval of an annexation resolution as hereinabove provided, an annexing municipality and any affected instrumentality of the state of Tennessee, such as, but not limited to, a utility district, sanitary district, school district, or other public

service district, shall attempt to reach agreement in writing for allocation and conveyance to the annexing municipality of any or all public functions, rights, duties, property, assets and liabilities of such state instrumentality that justice and reason may require in the circumstances . . .”

Further, Section 6-604 T.C.A. in the Municipal Corporations section provides that a county, utility district, municipality or other agency conducting any utility service may extend the same beyond its boundaries. A utility district is thus characterized and given the same authority as a county, a municipality or other public agency.

Further, Section 9-1202 T.C.A. dealing with revenue bond refinancing, subsection (a) provides as follows:

“The term ‘municipality’ shall mean any county, city, town township, utility, utility district, and sanitary district of this state.”

(s) Eugene Greener, Jr.

Sworn to and subscribed before me, this February 26, 1968.

My commission expires: 4-15-71.

(s) (Not Legible)  
Notary Public

## EXHIBIT 1

Form NLRB-1479  
(11-63)

United States of America  
Before the  
**NATIONAL LABOR RELATIONS BOARD**  
Case No. 26-RC-2972

The West Tennessee Public Utility District of Weakley, Carroll and Benton Counties, Tennessee \_\_\_\_\_ Employer<sup>1</sup>  
The International Union of District 50, United Mine Workers of America \_\_\_\_\_ Petitioner<sup>2</sup>

**DECISION AND ORDER**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:

1. The Utility District is not engaged in commerce within the meaning of the Act and it will not effectuate the purposes of the Act to assert jurisdiction herein.
2. The labor organization involved claim(s) to represent certain employees of the Employer.

<sup>1</sup> The name of the Utility District appears as amended at the hearing.

<sup>2</sup> The name of the Petitioner appears as amended at the hearing.

3. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, for the following reasons:

At the hearing, the Utility District renewed its pre-hearing motion to dismiss the petition on the ground that it is not an employer within the meaning of Section 2(2) of the Act. The record shows that the Utility District, which is engaged in distribution of natural gas to residents of the three Counties, was created in July 1953, under the provisions of the State of Tennessee's "Utility District Act of 1937," and subsequent amendments. The statute proscribed the procedure of incorporation, which calls for the filing of a petition in the County Court by residents of the proposed District, and directs the County Judge to determine that the "public convenience and necessity requires the creation of the district" and that the "creation of the district is economically sound and desirable." The record reveals that after a required public hearing the Weakley County Judge created the Utility District, as called for by the enabling legislation, and appointed the three original Commissioners which is the governing body of the Utility District. The enabling statute states that from the time of incorporation the district incorporated "shall be a municipality or public corporation in perpetuity . . . and a . . . body politic." The statute, inter alia, gives a Utility District power to "conduct, operate and maintain a system or systems for the furnishing of water, sewer, sewage disposal, natural gas, artificial gas, police . . . fire protection," and specifies that the Utility District "shall be the sole power" to furnish any of the services which it is authorized to furnish. The record reveals that the monies for the construction of the Utility District's natural gas system were raised, as authorized by the statute, by the sale of bonds. The interest paid to the bondholders are exempt from Federal and State Income Taxes. The Utility District has no stockholders and the Commissioners receive no salary, but are compensated for their expenses. The Commissioners have the power to subpoena witnesses and administer oaths. Among other powers, the Utility Dis-

trict can acquire, hold and dispose of both real and personal property and can exercise the rights of eminent domain to acquire real property. The enabling legislation exempts all property and revenue owned by the Utility District from state, county and municipal taxation. The Utility District pays no sales or gasoline tax on its purchases, having exemption certificates from the State of Tennessee. On the basis of the foregoing facts, it is clear that all of the powers, duties and authority of the Utility District derives from the State of Tennessee, and that the Utility Authority is a political subdivision of the State of Tennessee and is not an employer within the meaning of Section 2(2) of the Act. New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, 127 NLRB 1322. Accordingly, the Utility District's motion to dismiss the petition is granted.

**ORDER**

**It Is Hereby Ordered** that the petition filed herein be, and it hereby is, dismissed.

(s) John J. A. Reynolds, Jr.  
Regional Director, Region 26

**(Seal)**

Dated September 1, 1967  
at Memphis Tennessee

**EXHIBIT 3**

Filed December 4, 1957

(s) Dennis Payne, Clerk

To The Honorable John K. Williams, Chairman Of The County Court Of Hawkins County, Tennessee.

The ex parte petition for the creation of a utility district, as provided by Sections 6-2601-6-2636 of the Tennessee Code Annotated.

Your Petitioners, Whose Names Are Subscribed Below, Respectfully Show To The Court:

**1.**

Each of the petitioners are legal residents, within the boundaries of the proposed utility district as hereinafter described, and the owners of real estate therein.

**2.**

The utility district proposed to be created hereby intends to serve its area with natural gas, which is not now available therein. Said district will serve as a distributor and retailer of natural gas.

**3.**

The proposed corporate name of said district is "The Natural Gas Utility District of Hawkins County, Tenn.", and its boundaries shall be the entire area of Hawkins County, Tenn. (excluding, however, the areas encompassed by the territorial boundaries of three existing utility districts within said County, namely, (a) First Utility District of Hawkins County, Tenn., (b) Bulls Gap Utility District of Hawkins County, Tenn., & (c) Sorgoinsville Utility District of Hawkins County, Tenn.) and (d)

## 4.

The estimated cost of the construction of the facilities of said district is the sum of one million dollars (\$1,000,000.00).

## 5.

The following named persons, residents of said District, are hereby nominated as commissioners of the District:

Robert S. Lane	—Term of two years
Lance Rogan	—Term of three years
George O. Baker	—Term of four years

Wherefore, Premises Considered, Petitioners Pray:

1. That said Utility District be created, after a public hearing, as provided by law.
2. That the aforesaid persons be named as commissioners of the District.
3. And for general relief.

(Name)	(Address)
(s) C. C. Johnson, M.D.	Rogersville, Tenn.
(s) W. F. Phipps	Rogersville, Tenn.
(s) Owen K. Alley	Rogersville, Tenn.
(s) Jack A. Cooter	Rogersville, Tenn.
(s) Reid Terry	Rogersville, Tenn.
(s) Fred Harrison	Rogersville, Tenn.
(s) E. M. Henderson, M.D.	Rogersville, Tenn.
(s) (Not legible)	Rogersville, Tenn.
(s) George L. Googe	Pressmen's Home
(s) Thos. E. Dunwody	Pressmen's Home
(s) Howard Sullivan	Pressmen's Home
(s) Lon R. Beale	110 Main St. Rogersville, Tenn.
(s) J. S. Lyons, M.D.	Rogersville, Tenn.
(s) James O. Phillips, Jr.	626 E. Main Rogersville, Tenn.
(s) (Not legible)	Rogersville, Tenn.
(s) W. H. Lyons, M.D.	Rogersville, Tenn.
(s) Hiram D. Heck	Rogersville, Tenn.
(s) (Not legible)	Rogersville, Tenn.

(Name)	(Address)
(s) (Not legible)	Rogersville, Tenn.
(s) John E. Beal	Rogersville, Tenn.
(s) (Not legible)	Rogersville, Tenn.
(s) (Not legible)	Rogersville, Tenn.
(s) (Not legible)	Rogersville, Tenn.
(s) Joe A. Chambers	Rogersville, Tenn.
(s) Robert L. Ring	Rogersville, Tenn.
(s) M. B. Jones, Sr.	Rogersville, Tenn.
(s) Tom H. Rogan	Rogersville, Tenn.
(s) Dan Anderson	Rogersville, Tenn.
(s) Arthur Lyons	Rogersville, Tenn.
(s) Robert C. Armstrong, Jr.	Rogersville, Tenn.
(s) (Not legible)	Rogersville, Tenn.
(s) John Dalton	Rogersville, Tenn.
(s) Paul Greene	Rogersville, Tenn.
(s) Kenneth Honder	Rogersville, Tenn.
(s) (Not legible)	Rogersville, Tenn.
(s) (Not legible)	Rogersville, Tenn.
(s) Ernest Henderson	Rogersville, Tenn.
(s) J. H. McDonald	Rogersville, Tenn.

**State of Tennessee  
Hawkins County**

I, Dan Miner, hereby make oath that I circulated the foregoing petition, and that I witnessed the signature of each petitioner thereto; that each signature is the signature of the person it purports to be, and that to the best of my knowledge each petitioner was, at the time of signing, an owner of real estate within and a resident of the proposed district.

(s) Dan Miner

Sworn to and subscribed before me this 3rd day of December, 1957.

My commission expires October 15, 1960.

(s) Elizabeth A. Reese  
Notary Public

(Seal)

**EXHIBIT 4**

**In Re: The Natural Gas Utility District  
of Hawkins County, Tennessee**

**Before John K. Williams**

**Chairman of the County Court of  
Hawkins County, Tennessee**

**ORDER**

This matter came on to be heard before the Honorable John K. Williams, Chairman of the County Court of Hawkins County, Tennessee, on this 16th day of December, 1957, pursuant to a petition duly filed with the undersigned by more than twenty-five (25) owners of real property residing within the boundaries of the proposed Utility District, for the creation of a Utility District in accordance with the provisions of Sections 6-2601-6-2636 of the Tennessee Code as amended.

After hearing the evidence, and upon due consideration thereof, it satisfactorily appears that the public convenience and necessity requires the creation of the proposed Utility District, and that the creation of the District is economically sound and desirable. It is accordingly ordered and adjudged that The Natural Gas Utility District of Hawkins County, Tennessee, is hereby created.

The boundaries of said Utility District shall be:

The entire area of Hawkins County, Tennessee, (excluding, however, the areas encompassed by the territorial boundaries of three existing Utility Districts within the same county, namely: First Utility District of Hawkins County, Tennessee; Bulls Gap Utility District of Hawkins County, Tennessee; and Surgoinsville Utility District of Hawkins County, Tennessee).

The following persons are hereby appointed as Commissioners of said Utility District for the terms set opposite their respective names:

Robert S. Lane	2 years
Lance Rogan	3 years
George O. Baker	4 years

The costs of this proceeding, including the cost of publication of notice of this hearing, are hereby taxed against the several petitioners.

The Clerk of the County Court shall enter this order upon his records.

(s) John K. Williams  
Chairman of the County Court of  
Hawkins County, Tennessee

#### EXHIBIT 5

#### TRUST AGREEMENT

between

The Natural Gas Utility District  
of  
Hawkins County, Tennessee

and

Birmingham Trust National Bank  
Birmingham, Alabama

\$1,975,000 Natural Gas System Revenue Bonds

This Trust Agreement, dated May 9, 1962, between The Natural Gas Utility District of Hawkins County, Tennessee, (hereinafter sometimes referred to as "the Municipality"), party of the first part, and Birmingham Trust National Bank, a banking association duly organized and existing under and by virtue of the laws of Alabama and having its principal office in Birmingham, Alabama, (hereinafter sometimes referred to as "the Trustee"), party of the second part,

## WITNESSETH:

Whereas, the Municipality pursuant to a resolution adopted on the 9th day of May, 1962, entitled: "Resolution Authorizing the Issuance of \$1,975,000 Natural Gas System Revenue Bonds of the Natural Gas Utility District of Hawkins County, Tennessee; Prescribing the Form and Other Details of Said Bonds; Providing for the Collection and Disposition of the Revenues to Be Derived From Its Natural Gas System; Making Other Provisions With Respect to the Operation of Said System and the Issuance of Said Bonds; and Providing for the Security and Payment of Said Bonds and the Appointment of a Trustee Therefor," a true and complete copy of which is attached hereto and made a part hereof as fully and to the same extent as if incorporated verbatim herein, has authorized the issuance of \$1,975,000 Natural Gas System Revenue Bonds (hereinafter sometimes referred to as "the bonds") for the purpose of financing the cost of constructing a natural gas system for the Municipality (hereinafter sometimes referred to as "the system"); and

Whereas, the Municipality will sell and deliver the bonds pursuant to the provisions of said resolution; and

Whereas, the resolution provides that upon delivery of the bonds, the accrued interest received upon such delivery and the sum of \$325,875 shall be deposited in the Natural Gas System Principal and Interest Fund established pursuant to Section 8(b) of the resolution and a portion of the principal proceeds of the bonds shall be deposited in the Natural Gas Construction and Contingency Fund established pursuant to Section 15(c) of the resolution; and

Whereas, the Municipality has covenanted that the net revenues derived from the operation of the system will be deposited in the Principal and Interest Fund, the Reserve Fund, the Extension and Replacement Fund, and the Bond Redemption Fund established in the resolution; and

Whereas, the Municipality has, in and by the resolution, further covenanted and agreed that it will execute a trust agreement with the Trustee for the benefit of the

holders from time to time of the bonds, in the form and terms hereof, and the Trustee, by its execution of this trust agreement accepts its appointment as the Trustee in accordance with the terms and provisions of the resolution and this trust agreement;

Now, Therefore, in consideration of the premises and of the mutual covenants and agreements hereinafter set forth and pursuant to the terms and provisions of the resolution, the Municipality, as party of the first part, and the Trustee, as party of the second part, have agreed and do hereby agree as follows for the equal and proportionate benefit and security of the holders of the bonds and the interest coupons thereto appertaining as follows:

Section 1. The Municipality will make deposits in the Principal and Interest Fund, the Principal and Interest Reserve Fund, the Extension and Replacement Fund and the Bond Redemption Fund with the Trustee, in the manner and amounts and at the times provided in the resolution.

Section 2. The Trustee will maintain such funds on deposit with it and will disburse and apply the money therein only in the manner provided in the resolution. Before making any disbursements or payments from any of the funds maintained with the Trustee, the Trustee shall first receive all certificates, resolution or other documents required for such disbursements or payments by the resolution or this trust agreement.

Section 3. The Trustee will invest and reinvest the money at any time on deposit in the Reserve Fund and the Extension and Replacement Fund only in the manner provided in the resolution and only upon the written request of the Municipality, evidenced by a resolution certified by the Secretary of the Board of Commissioners of the Municipality to have been duly adopted by said Board, or the request of an officer of the Municipality to whom the Board of Commissioners of the Municipality by a resolution certified by such Secretary to have been duly adopted has delegated the power and authority to request the Trustee to make such investments or reinvestments.

Any of such investments or reinvestments shall be liquidated by the Trustee whenever necessary to make any of the payments required or permitted to be made

from either of said funds by the provisions of the resolution without any further authority from the Municipality except this trust agreement.

The Trustee shall not be liable for any loss as a result of such investments or reinvestments made as provided above, and all income and increment from such investments or reinvestments shall be deposited in the Gross Revenue Account as provided in the resolution.

Section 4. The Trustee will maintain the Natural Gas Construction and Contingency Fund and said fund shall be disbursed upon receipt by the Trustee of a certificate signed by two commissioners of the Municipality approving such disbursement in a specified amount, designating the payee of such disbursement and stating that such disbursement is properly payable to said payee for legal, fiscal, engineering or other expenses incurred in connection with the issuance of the bonds, or for services rendered or material or property supplied for the construction of the natural gas system of the Municipality pursuant to a contract between the Municipality and L. F. Wilder Construction Company of Birmingham, Alabama, dated April 9, 1962.

Section 5. The Trustee shall have all of the rights provided for in Section 11 of the resolution upon the happening of the conditions specified therein.

Section 6. Whenever the Municipality determines to purchase any bonds for retirement in accordance with the provisions of the resolution, the Municipality shall furnish to the Trustee, prior to the date fixed for such purchase a copy, certified by the Secretary of the Board of Commissioners of the Municipality to have been duly adopted by the Board of Commissioners of the Municipality, of a resolution authorizing such purchase.

Whenever the Municipality shall call any bonds for redemption, the Municipality shall furnish to the Trustee, prior to the date fixed for such redemption, (a) a copy certified by the Secretary of the Board of Commissioners of the Municipality to have been duly adopted by said Board, of a resolution authorizing such redemption, (b) a copy of the notice of redemption, together with proof satisfactory to the Trustee that such notice has been duly published or given in the manner provided in the

resolution and (c) funds sufficient (together with any other funds then held by the Trustee and available for the purpose) for the payment of the entire amount of principal, premium (if any), and interest required for such redemption.

Section 7. The Trustee has executed this trust agreement and agrees to carry out the terms and provisions hereof on its part, but only upon and subject to the following express terms and conditions:

(a) The Trustee shall not be responsible for any recitals herein or in the bonds or in the resolution or for the validity of this trust agreement or of the bonds, or of the resolution nor for the performance of any of the agreements herein or in the resolution contained on the part of the Municipality.

(b) The Trustee shall not be liable except for the performance of such duties as are specifically set forth in this trust agreement and the resolution, and no implied covenants or obligations shall be read into this trust agreement or the resolution against the Trustee.

(c) The Trustee shall have no responsibility with respect to the issuance of the bonds or with respect to compliance by the Municipality with the provisions of the resolution or of any other resolution relative to such issuance. The Trustee shall not be accountable for any of the proceeds of the bonds or of the revenues of the system nor for any other funds of the Municipality, except such funds as may be deposited with or under the control of the Trustee, nor for the use of any funds deposited with or under the control of the Trustee and paid out conformably with the resolution and this trust agreement. The Trustee shall not be required to allow interest on any funds at any time deposited hereunder. The Trustee may become the owner of bonds with the same rights which it would have if not Trustee hereunder.

(d) The Trustee shall not be liable for any action taken or omitted to be taken by it in good faith and in the exercise of reasonable care and believed by it to be within the discretion or power conferred upon

it by this trust agreement, nor shall the Trustee be responsible for the consequences of any error of judgment, and the Trustee shall not be answerable except for its own acts, receipts, neglect and default, nor for any loss unless the same shall happen through the negligence or want of good faith of the Trustee.

(e) The Trustee may consult with counsel (who may be of counsel for the Municipality), and any opinion of counsel shall be full and complete authorization and protection in respect of any action taken or suffered or omitted by it hereunder or under the resolution in good faith and in accordance with such opinion of counsel.

(f) The Trustee shall be protected in acting upon any notice, resolution, request, consent, certificate, report, opinion, statement, bond or other document believed by it to be genuine and to have been signed, adopted or authorized by the proper party or parties or by a person or persons authorized to act on his or their behalf or to have been prepared and furnished pursuant to any of the provisions of this trust agreement or of the resolution.

(g) The Trustee may conclusively rely as to the truth of the statements and the correctness of opinions expressed therein, in the absence of bad faith, upon any resolutions, certificates, reports, opinions, statements or other documents conforming to the requirements of this trust agreement or of the resolution; but, in the case of any such document which by any provision of this trust agreement or of the resolution is specifically required to be furnished to the Trustee, the Trustee shall be under a duty to examine the same to determine whether or not it conforms to the requirements of this trust agreement and of the resolution.

(h) Except as otherwise provided in this trust agreement or in the resolution, any requisition, request, notice, report, statement or other document filed with the Trustee on behalf of the Municipality shall be deemed to have been signed by the proper party or parties if signed by the President or Secretary of the Board of Commissioners of the Municipality.

pality. The Trustee may accept a certificate signed by said Secretary as conclusive evidence that any resolution has been duly adopted by the Board of Commissioners of the Municipality. Except as otherwise expressly provided in this trust agreement or in the resolution, a certificate of said President or Secretary as to the existence or non-existence of any fact pertinent to the right of the Trustee to take or refrain from taking any action under this trust agreement or under the resolution, may be accepted by the Trustee as conclusive evidence of the facts therein stated and shall constitute full protection to the Trustee for any action taken or omitted to be taken by it in good faith in reliance thereon.

(i) None of the provisions contained in this trust agreement or in the resolution shall require the Trustee to advance or use its own funds or otherwise incur personal financial liability in the performance of any of its duties or the exercise of any of its rights or powers, if there is reasonable ground to believe that the repayment of such funds or protection from such liability is not reasonably assured. The Trustee shall be under no obligation to exercise any of the rights or powers vested in it by this trust agreement or by the resolution at the request or direction of any of the bondholders pursuant to this trust agreement or of the resolution, unless such bondholders shall have offered to the Trustee adequate security and indemnity against the costs, expenses and liabilities to be incurred by it by compliance with such request or direction.

(j) The Trustee shall secure all money on deposit with the Trustee at any time in the manner provided in the resolution.

(k) The Trustee shall have a lien hereunder upon all money on deposit in the Revenue Account described in the resolution for reasonable compensation, expenses, advances and counsel fees incurred in and about the exercise and performance of its powers and duties hereunder, and the cost and expense of defending against any liability in the premises of

any character whatsoever. The compensation of the Trustee shall not be limited to or by any provision of law in regard to compensation of a Trustee of an express trust.

(1) The Trustee may resign and be discharged from the trusts created by this trust agreement and by the resolution by giving written notice thereof to the Municipality. Such resignation shall become effective on the day specified in such notice or upon the appointment of a successor Trustee and such successor's acceptance of such appointment, whichever is earlier.

The Trustee may be removed upon application by the holders of a majority in principal amount of the bonds then outstanding by an instrument or concurrent instruments in writing signed or executed by such bondholders or by their authorized agents in the manner provided in Section 8 of this trust agreement and filed with the Municipality and the Trustee. The Trustee may also be removed by the Municipality for cause, by filing with the Trustee a copy of a resolution providing for such removal certified by the Secretary of the Board of Commissioners of the Municipality to have been duly adopted by said Board.

In case the Trustee or any successor thereof shall resign or shall be removed or shall become incapable of acting, or shall be adjudged a bankrupt or insolvent, or if a receiver of the Trustee or of its property shall be appointed, or if any public officer shall take charge or control of the Trustee or of its property or affairs for the purpose of rehabilitation, conservation or liquidation, a successor Trustee may be appointed by the Municipality by filing with the retiring Trustee and with such successor Trustee a copy of a resolution appointing such successor, certified by the Secretary of the Board of Commissioners of the Municipality to have been duly adopted by said Board. Any successor Trustee shall be a bank or trust company authorized to perform all of the duties required by this trust agreement and the resolution. Every successor Trustee appointed hereunder shall

execute, acknowledge and deliver to its predecessor and also to the Municipality an instrument in writing accepting such appointment hereunder, whereupon such successor Trustee, without any further act, deed or conveyance shall become fully vested with all of the estates, rights, powers, duties and obligations of its predecessor and every predecessor Trustee shall deliver all money and securities, together with a record of the amount and the numbers of the outstanding bonds, to its successor, provided, however, that before such delivery is required or made, all fees, advances and expenses of the retiring Trustee shall be paid in full.

Any corporation into which the Trustee or any successor to it may be merged or converted or with which it or any successor to it may be consolidated, or any corporation resulting from any merger, conversion or consolidation to which the Trustee or any successor to it shall be a party, shall be the successor Trustee under this trust agreement without the execution or filing of any paper on the part of either of the parties hereto.

Section 8. Any request, consent or other instrument required by this trust agreement or the resolution to be signed and executed by bondholders may be in any number of concurrent writings of substantially similar tenor and may be signed or executed by such bondholders in person or by agent or agents duly appointed in writing. Proof of the execution of any such request or other instrument or of a writing appointing any such agent, or of the holding by any person of bonds transferable by delivery, shall be sufficient for any purpose of this trust agreement and the resolution and shall be conclusive in favor of the Trustee and of the Municipality if made in the manner provided in this section.

The fact and date of the execution by any person of any such request, consent or other instrument or writing may be proved by the affidavit of a witness of such execution or by the certificate of any notary public or other officer of any jurisdiction, authorized by the laws thereof to take acknowledgments of deeds, certifying that the

person signing such request, consent or other instrument acknowledged to him the execution thereof.

The amount of bonds transferable by delivery held by any person executing any such request, consent or other instrument as a bondholder, and the distinguishing numbers of the bonds held by such person, and the date of his holding the same, may be proved by a certificate executed by any responsible trust company, bank, banker or other depositary (wherever situated), if such certificate shall be deemed by the Trustee to be satisfactory, showing that at the date therein mentioned such person had on deposit with such depositary, or exhibited to it the bonds therein described; or such facts may be proved by the certificate or affidavit of the person executing such request or other instrument as a bondholder, if such certificate or affidavit shall be deemed by the Trustee to be satisfactory. The Trustee and the Municipality may conclusively assume that such ownership continues until written notice to the contrary is served upon the Trustee.

The ownership of bonds registered as to principal shall be proved by the register of such bonds.

Any request, consent or vote of the holder of any bond shall bind every future holder of the same bond and the holder of every bond issued in exchange therefor or in lieu thereof, in respect of anything done or suffered to be done by the Trustee or the Municipality in pursuance of such request, consent or vote.

Section 9. All terms used herein which are defined in the resolution shall be deemed to have the respective meanings ascribed thereto in the resolution.

Section 10. The Municipality covenants that proper books and records will be kept, in which full, true and correct entries will be made of all income, expenses and transactions of and in relation to the system in the manner provided in the resolution, and that it will punctually file with the Trustee all monthly, annual or other reports, budgets or other documents required by the resolution or this trust agreement to be filed with the Trustee, at the times and in the manner provided in the resolution and this trust agreement.

Section 11. Nothing in this trust agreement expressed or implied is intended or shall be construed to confer

upon any person, firm or corporation, other than the parties hereto and the holders of the bonds and the coupons appertaining thereto, any right, remedy or claim, legal or equitable, under or by reason of this trust agreement or any covenant, condition or stipulation hereof.

This trust agreement is made for the benefit of the holders of the bonds from time to time and the provisions of this trust agreement shall constitute a contract between the Municipality and the Trustee and the bondholders as fully and to the same extent as if incorporated verbatim in the resolution and may be fully enforced by any of the holders of the bonds, or of the coupons appertaining thereto.

Section 12. Upon the final payment and retirement of all the bonds and the interest thereon, any balance of money remaining in any of said funds on deposit with the Trustee or under its control shall be remitted to the Municipality.

In Witness Whereof, The Natural Gas Utility District of Hawkins County, Tennessee, has caused this trust agreement to be signed in its name by the President of the Board of Commissioners of said District, and its corporate seal to be hereunto affixed and attested by the Secretary of said Board and Birmingham Trust National Bank has caused this trust agreement to be signed in its corporate name by its corporate trust officers and its corporate seal to be hereunto affixed and attested by its Assistant Cashier, all as of the day and year first above written.

The Natural Gas Utility District of  
Hawkins County, Tennessee

(Seal) By (s) G. O. Baker,  
Attest: President, Board of Commissioners

(s) Robert S. Lane,  
Secretary, Board of Commissioners  
Birmingham Trust National Bank

(Seal) By (s) H. R. XXX XXXXX  
Attest: Corporate Trust Officer

(s) (Not Legible)  
Assistant Cashier

**AFFIDAVIT OF JAMES O. PHILLIPS, JR.**

State of Tennessee      )  
County of Hawkins      )

Comes James O. Phillips, Jr., and makes oath in due form of law as follows:

Affiant is 57 years of age, a resident of Rogersville, Tennessee, and has lived in said town for all of his life. Affiant has been engaged in general law practice at the same location since the year 1932. He is presently a member of the legal firm of Phillips & Hale, and has held some public offices within said County, including that of Mayor of Rogersville, County Attorney for Hawkins County, Chairman of the City School Board. Affiant has also been connected with one of the banks located in Hawkins County, as Chairman and Member of the Board of Directors, and by reason of his experience in the above fields is somewhat familiar with the general conditions which has prevailed in Hawkins County, Tennessee for the past few years.

Hawkins County contains an area of 480 square miles, and on and prior to December 16, 1957, it was largely a rural area, made up of a number of small farms. The population according to the 1960 census was 30,468.

In the year 1957, and for some time prior thereto, the price structure for agricultural products was such that a reasonable living could not be made upon most of the small farms within Hawkins County. Burley tobacco allotments were steadily being decreased, and this deprived our farmers of a considerable portion of their one good "cash crop." Only fully mechanized, large farms could be operated at a fair profit which would support an average family of four. The result of this situation was that, at this time, the youth of the County were leaving the county just as soon as they finished high school or college, as there was no hope of employment for them at home. In order to prevent a sharp decline in population, and in order to maintain sufficient tax revenues to keep local governmental services (especially

education) in line with prevailing standards, it became apparent that the County must obtain some industrial plants.

When industries were contacted, it was found that in most instances new factories will not be located in areas where natural gas is unavailable. An effort was made to have this commodity distributed within the County by a retailer operating in an adjoining county. They could or would not do so, due to financial problems. None of the municipalities then in the county could be interested in undertaking this function. So it was that, under the direction of the Hawkins County Chamber of Commerce, and with some assistance from the communities of Rogersville, Surgeonsville and Pressmen's Home, The Natural Gas Utility District of Hawkins County, Tennessee was organized, under the provisions of The Utility District Act of 1937. It should be added that we learned that the Town of Oak Ridge, Tennessee had obtained natural gas in this same manner.

A sort time prior to December 16, 1957, affiant, together with Mr. Robert S. Lane of Rogersville, Tennessee, contacted Mr. Thomas E. Dunwody, who was then President of International Printing Pressmen & Assistant Union of North America, located at Pressmen's Home, Tennessee. Mr. Dunwody (together with Mr. George L. Googe, Secretary-Treasurer of I.P.P. & A. U. of N. A.) were most interested in obtaining natural gas supply for heating purposes for the Pressmen's Home community. It was agreed that a utility district would be organized for the purpose of providing natural gas to Hawkins County including Pressmen's Home, with the hope and expectation that the necessary financing could be obtained through the sale of revenue bonds. Mr. Dunwody suggested Mr. George O. Baker (then President of the Technical Trade School at Pressmen's Home) to serve as a utility district commissioner for that area. Mr. Robert S. Lane agreed to serve from the Rogersville area and Mr. Lance W. Rogan, an automobile dealer was likewise contacted and he agreed to serve as the third commissioner. The organizing petition was actually cir-

culated by Mr. Dan Miner, who had formerly been employed with one or more natural gas systems, and who was very much interested in natural gas being brought into Hawkins County.

Although the Utility District was organized in 1957, it was not until 1962 that the District was able to obtain the necessary financing. In the interim, we tried every possible source including, various U. S. Governmental agencies. In 1962, the firm of Hugo Marx & Company of Birmingham, Alabama, contracted to buy and re-sell the District's revenue bonds in the total amount of \$1,950,000, and did so buy and re-sell them. With the proceeds, the District did construct a natural gas distribution system, extending from Rogersville, northerly to Pressmen's Home (12 miles), and from Rogersville easterly to a point near the Sullivan County line (26 miles), the latter serving the communities of Surgoinsville, Church Hill and Mount Carmel. Rural homes located in reasonably close proximity to the distribution lines are served throughout the County. The District now serves a total of approximately 975 residences, of which at least one-half would be considered as being rural homes.

Since the formation of the Utility District, and its commencing operations, the following industrial plants have been located within the County:

Kingsport Press Employees 350	Approximate cost \$20,000,000.
Holliston Mills (2) Employees 510	Approximate cost \$30,000,000.
Alladin Plastics Employees 90	Approximate cost \$ 2,000,000.

All of these plants are served by our Utility District, and none of them would have been located within the County, had natural gas not been available for them.

(s) James O. Phillips, Jr.

Sworn to and subscribed before me, this February 21, 1968.

(s) Nona Carpenter  
Notary Public

My Commission Expires: 8-11-69.

POINTS AND AUTHORITIES ON BEHALF OF THE NATURAL GAS UTILITY DISTRICT OF HAWKINS COUNTY, TENNESSEE

(Case No. 10-CA-7213)

The Natural Gas Utility District of Hawkins County, Tennessee, submits the following Points and Authorities:

The National Labor Relations Act, as amended, provides Section 2(2) Employer:

"The term 'employer' includes any person acting as an agent of an employer directly or indirectly but shall not include the United States or any wholly owned government corporation, or any Federal Reserve Bank, or any state or political subdivision thereof . . ."

Specifically, it is the contention of the District that it is a political subdivision of the State of Tennessee.

In holding such a utility district constitutional, the State Supreme Court said in Water Utility District v. McCanless, 177 Tenn. 128, among other things, as follows, talking about whether or not it may be exempted from taxation as an arm of state government.

"If this incorporated Utility District is property of the State, or of any one of the arms of the State government, then it is well settled that it may be exempted from taxation by the Legislature. State ex rel. Fort, Commissioner, et al. v. City of Jackson, 172 Tenn. 119, 110 S. W. 2d 323, and numerous cases there cited. It is said that it does not come within this classification and is not an operation for a State, governmental or public purpose. We think the act quite clearly so classes and characterizes it. We have quoted its declaration of 'Corporate Purpose.' And, in Section 3, it is declared to be a 'Municipality' or public corporation in perpetuity under its corporate name', etc. A municipal corporation is a body established by law, 'chiefly to regulate the local internal affairs of the city, town, or district incorporated', adopting defining words from State v. Knoxville, 115 Tenn. 175, 90 S. W. 289, 298, and italicizing 'dis-

trict." And it was held in Redistricting Cases, 111 Tenn. 234, 80 S. W. 750, that municipal corporations are 'arms of government', are 'means or instrumentalities of the State government', etc. It is elementary that the Legislature may call such bodies what it pleases, and may give and take away as it chooses their powers and privileges. Here it has chosen to make provision for the creation and operation, in the manifest interest of the public, in these days of necessity for water, light, fire and sewer protection, of a somewhat new and quite limited in scope corporate instrumentality. We find no restriction upon legislative authority as to the size, powers or field of operations, in the creation of one of its arms or instrumentalities. We have various illustrations of analogous agencies which this Court has recognized the power of the legislation to create, which necessarily had exemption from taxation. For instance, discussing the organization of a drainage district, in his opinion in Pritchard v. Johnson-Toby-Construction Co., 155 Tenn. 571 at page 576, 296 S. W. 17, at page 19, Mr. Justice Swiggart said:

'It is our opinion that the board of directors of the drainage district, appointed under the authority of the statute, and vested with the general control and management of the business affairs of the district, with power to make contracts for improvements, etc., must be considered as a quasi public corporation, charged with the duty of executing a governmental purpose as a governmental agency. Miller v. Washington County, 143 Tenn. 488, 226 S. W. 199; Board of Park Commissioners v. Nashville, 134 Tenn. 612, 635, 639, 185 S. W. 694.'

"The cases he cites are in point, one a road district and the other a park. And see Knoxville Housing Authority v. Knoxville, 174 Tenn. 76, 123 S. W. 2d 1085; University of Tennessee v. People's Bank, et al., 157 Tenn. 87, 6 S. W. 2d 328."

It has been repeatedly held that municipal corporations are not employers within the meaning of Section 2(2) of the National Labor Relations Act.

Local 833 Automobile Workers, 116 NLRB 267.  
Yellow Coach Lines, Inc., NLRB Case No. 5-RC-2416.

And similarly, even though a municipality is engaged in a proprietary function, Blount Electric System, Case No. 10-RC-3959. Similarly, it has been held in reference to road commissions, Indiana Toll Road Commission, Case No. 13-RC-6021, and New Jersey Turnpike Authority, Case No. 4-RC-2245.

It is necessary at this point to digress long enough to make the point that copies of certain cited decisions substantiating the employer's position herein are no longer available. Specifically, Volume 1, "Labor Relations: of Commerce Clearing House, Inc. Labor Law Reporter, at Par. 1635.10 et seq. lists various decisions with citations including the letters "RC". These, of course, are cases decided by various of the NLRB Regional Offices and include Indiana Toll Road Commission case, Blount Electric System case, New Jersey Turnpike Authority case, and Yellow Coach Lines, Inc. case, just cited above. The undersigned has written to the particular region in an attempt to obtain copies of the decision in question. It has heard from three of the regions, copies of letter from same are attached hereto. It is significant, for instance, in the New Jersey Turnpike Authority case to note that the Regional Director from Philadelphia has indicated that the Board held that "the employer was not an 'employer'" within the meaning of Section 2(2) of the Act, that the case was dismissed, appealed and the appeal was denied (See the letter to Eugene Greener, Jr. from Bernard Samoff, dated August 17, 1967). In reference to this decision, the following is quoted from 33 Labor Relations Reference Manual commencing at page 1528:

"The Regional Director is sustained in his dismissal of representation petition, requesting a unit of toll collectors employed by the New Jersey Turnpike Authority in operation of its toll highways within the State.

The New Jersey Turnpike Authority is not an employer within the meaning of Sec. 2(2) of the Act, in view of the powers, duties and obligations given

to it by the State Legislature in establishing it as part of the State Highway Department.

The Turnpike Authority comprises three members appointed by the Governor for a term of 5 years with the advice and consent of the Senate. It was established on Jan. 31, 1950 by Act of the New Jersey State Legislature for the purpose of constructing, operating and maintaining turnpike projects, with authority to finance such projects by the issuance of bonds and collection of tolls. The Authority may acquire, hold, and dispose of both real and personal property, and exercise the power of eminent domain to acquire real property. Neither the faith and credit of the State, nor its taxing power, is pledged to the payment of bonds issued by the Authority, but the bonds and the property of the Authority are exempt from taxation."

It is also significant, in reference to the Indiana Toll Road Commission case, (See letter from William T. Little to Eugene Greener, Jr., dated August 23, 1967) it is stated that "the petition was dismissed by the 13th Region on July 11, 1958, and the case closed."

Apparently, these decisions were so obvious and routine that it was not necessary to include these as NLRB officially reported decisions.

The undersigned has written to the alleged employer in each case to see if it has retained copy of the decisions, and if the same are available, they will be forwarded subsequently.

The Supreme Court of Tennessee in City of Alcoa v. International Broth. of Elec. Wkrs., 308 S. W. 2d 476, held by virtue of the exemption provided by Section 2(2) of the National Labor Relations Act that it, rather than the NLRB, has jurisdiction over the City of Alcoa, and the following is quoted from that opinion starting on page 478:

"The Congress of the United States is enacting the National Labor Relations Act as amended, has excluded from the operation of this Act municipal corporations such as the City of Alcoa. In the Act the

term 'employer' is defined in Section 2 of the National Labor Relations Act as amended (29 U.S.C.A. § 152(2)):

'The term employer \* \* \* shall not include \* \* \* any state or political subdivision \* \* \*'

And in Section 2(3) of said Act the term 'employee' is defined as follows (29 U.S.C.A. § 152(3)):

'the term employee shall not include \* \* \* any individual employed \* \* \* by any other person who is not an employer as herein defined.'

Since the Act expressly excludes political subdivisions we can hardly see how this doctrine of pre-emption under any stretch of the imagination or discretion of the labor board could here apply.

In *Nutter v. City of Santa Monica*, 74 Cal. App. 2d 292, 168 P. 2d 741, 745, that Court in speaking of the propositions we are considering said:

'\* \* \* Congress did not recognize the existence of the right of collective bargaining in public employment and did not consider it necessary to adopt a national policy which would extend into the field of public employment.'

Two cases have been cited to us in the brief of the appellees wherein the National Labor Relations Board has definitely recognized the absence of a statutory basis to direct an election by the employees where the employer involved is a municipality or other political subdivision of a State. These two cases are: In Matter of New Jersey Turnpike Authority Case No. 4-RC-2245, decided April 16, 1954, 33 L.R.R.M. 1528, and Matter of City of Anchorage, Alaska, Case No. 19-RC-1300, decided August 17, 1953, 32 L.R.R.M. 1549. It seems in view of this fact if the union and those in the position that it takes herein were to file a petition with the National Labor Relations Board (under the facts of this case) that Board would undoubtedly refuse the action as it did in the two instances above.

The National Labor Relations Act does not apply to the issues involved in the present controversy."

Accordingly, it seems clear the District is exempt as a political subdivision of Tennessee.

Further, a comparison of the powers and duties of the Commissioners in the above cited toll road commission cases, in the Harbor District case, Oxnard Harbor District, 34 NLRB 1285, and the steamship authority case, New Bedford, Woods Hole, Martha's Vineyard and Nantucket Steamship Authority, 127 NLRB 1322, compels the conclusion that The Natural Gas Utility District of Hawkins County, Tennessee, is a municipality and/or a subdivision of the state government.

It is respectfully submitted that the following partial list of the attributes of The Natural Gas Utility District of Hawkins County, Tennessee, one of nearly 270 such districts in Tennessee, further compels the conclusion that the District is a subdivision of the State of Tennessee. These districts provide various types of services such as water, fire protection, police, sewerage disposal, etc. as well as natural gas. The precedent value of this case as affecting these other districts is of extreme significance:

- (a) Operated by a board of commissioners who serve for only nominal compensation;
- (b) Commissioners appointed by a county judge, a publicly elected official, after approving petition for incorporation based on public convenience and economic necessity, vacancies filled by the remaining commissioners, but if they cannot agree, by the county judge.
- (c) Authority delegated to county judge to so act by act of the legislature;
- (d) Act of legislature provides specifically the district shall be a municipality;
- (e) Act further provides that its property and its bonds shall be exempt from state taxation; interest on bonds, U. S. income tax free;
- (f) Pays no sales tax or gasoline tax; receive motor vehicle license tags available to governmental entities;

- (g) Not regulated by State Public Service Commission as are private utilities;
- (h) May voluntarily contract for social security coverage for its employees as employees of state or political subdivision thereof;
- (i) The State Supreme Court and various statutes specifically state the district to be an instrumentality of the state government;
- (j) District may exercise power of eminent domain and even against other governmental entities.
- (k) Authority to finance construction by bonds which are classified as municipal bonds;
- (l) Commissioners have power to subpoena witnesses and to administer oaths; records of Commission are characterized as "public records" by statute.
- (m) Publication of annual statements in newspapers of general circulation required.
- (n) No stockholders; any surplus must go for rate reduction.

In conclusion, it is submitted that it is quite clear that a utility district, such as The Natural Gas Utility District of Hawkins County, Tennessee, is exempt from the National Labor Relations Act as a political subdivision of the State of Tennessee. This conclusion is compelled. There is no significant attribute to the contrary.

Dated the 26th day of February, 1968.

Respectfully submitted,

(s) Eugene Greener  
Buchignani & Greener  
104 DuPont Building  
Memphis, Tennessee

(s) J. O. Phillips  
Citizens Union Bank Bulding  
Rogersville, Tennessee

UNITED STATES OF AMERICA  
BEFORE THE  
NATIONAL LABOR RELATIONS BOARD

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Case No. 10-CA-7213

THE NATURAL GAS UTILITY DISTRICT OF HAWKINS  
COUNTY, TENNESSEE

and

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES  
OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE  
UNITED STATES AND CANADA, AMERICAN FEDERATION  
OF LABOR, LOCAL NO. 102

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DECISION AND ORDER

Upon a charge filed by United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, American Federal of Labor, Local No. 102, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 10, issued a complaint dated February 1, 1968, against The Natural Gas Utility District of Hawkins County, Tennessee, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served on the parties to this proceeding.

The complainant alleges, in substance, that on November 6, 1967, the Union was duly certified as the exclusive bargaining representative of the Respondent's employees in an appropriate unit, and that, on or about December 7, 1967, and thereafter, the Respondent refused to recog-

nize or bargain with the Union as such exclusive bargaining representative, although the Union requested the Respondent to do so. On February 6, 1968, Respondent filed its answer to the complaint, in which it admitted in part and denied in part the allegations contained therein, and requested that the complaint be dismissed.

On February 16, 1968, the General Counsel filed with the Board a Motion for Summary Judgment, asserting that there were no issues of fact or law which had not already been litigated before and determined by the Board in a Decision and Direction of Election in a prior representation case,<sup>1</sup> and requesting an appropriate order remedying the violations as alleged in the complaint. Thereafter, on February 19, 1968, the Board issued an Order Transferring Proceeding to the Board and Notice to Show Cause why General Counsel's Motion for Summary Judgment should not be granted. Pursuant thereto, Respondent filed a Response to the Notice to Show Cause with a supporting Memorandum.

Upon the entire record in this case, the Board makes the following:

#### Ruling on the Motion for Summary Judgment

The record establishes that pursuant to a petition filed by the Union on April 24, 1967, in the abovementioned representation case, a hearing was held before a Hearing Officer of the Board on June 19, 1967, at the close of which the proceeding was transferred to the Board. The Respondent denied that its operations were within the Board's statutory jurisdiction, contending that it was and is an exempt political subdivision of the State of Tennessee. On October 6, 1967, the Board issued its Decision and Direction of Election in which jurisdiction was asserted. On October 19, 1967, the Respondent filed with the Board a motion for further hearing on the jurisdictional issue. The Board, having duly considered the matter, denied the motion on October 24, 1967.

On October 27, 1967, an election was held, in which a majority of the valid ballots were cast for the Union. No objections having been filed, the Union was certified on November 6, 1967.

<sup>1</sup> 167 NLRB No. 100.

By letter dated December 4, 1967, the Union requested the Respondent to bargain collectively. Respondent, by letter dated December 7, 1967, refused to bargain collectively with the Union, and on January 10, 1968, the Union filed the charge upon which these proceedings are predicated.

In its Response to the Notice to Show Cause, Respondent predicates its refusal to bargain solely upon its denial of the Board's jurisdiction. Respondent alleges that it is an "employer" as defined in Section 2(2) of the Act, but rather, a political subdivision of the State of Tennessee. Respondent accordingly contests the validity of the Board-conducted election and the Certification of Representative based thereon.

It is well settled that in the absence of newly discovered or previously unavailable evidence, a respondent in a Section 8(a)(5) proceeding is not entitled to relitigate issues which were or could have been raised in the prior representation proceeding.<sup>2</sup> As all contentions now made were raised at the earlier hearing in the representation case,<sup>3</sup> and were considered and rejected by the Board, and as all factual allegations of the complaint are admitted by Respondent's answers to the complaint or stand admitted by the failure of Respondent to controvert the averments of the General Counsel's motion, there are no matters in is-

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<sup>2</sup> Pittsburgh Plate Glass Company v. N.L.R.B., 313 U.S. 146; N.L.R.B. v. Aerovox Corp., — F.2d — (C.A. 4, January 29, 1968); The Sheffield Corporation, 163 NLRB No. 34; and Collins & Aikman Corp., 160 NLRB 1750.

<sup>3</sup> The Respondent's contention that the decision in The West Tennessee Public Utility District of Weakley, Carroll and Benton Counties, Tennessee, 26-RC-2972 (not published in NLRB volumes), is in conflict with and requires reversal of the Board's Decision and Direction of Election in the prior representation case is without merit. That case was decided on September 1, 1967, by the Regional Director for Region 26, who found that the employer therein was a political subdivision of the State of Tennessee and not an "employer" within the meaning of Section 2(2) of the Act. However, no Request for Review by the Board was filed by any party thereto. Accordingly, the Board had no occasion to affirm or reject that holding, and it is not controlling in the instant matter.

sue requiring a hearing before a Trial Examiner. Accordingly, the General Counsel's Motion for Summary Judgment is granted.

On the basis of the record before it, the Board makes the following:

### **Findings of Fact**

#### **I. The Business of the Respondent**

Respondent is incorporated under the provisions of the Tennessee Utility District Act and maintains its principal office and place of business at Rogersville, Tennessee, where it is engaged in the sale and distribution of natural gas to residential house, commercial businesses, and industrial firms located in Hawkins County, Tennessee. During the course and conduct of its business operations for the preceding calendar year, the Respondent purchased and received goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of Tennessee. During the same period of time, the Respondent received gross revenue valued in excess of \$250,000. We find that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

#### **II. The Labor Organization Involved**

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, American Federation of Labor, Local No. 102, is a labor organization within the meaning of Section 2(5) of the Act.

#### **III. The Unfair Labor Practices**

##### **A. The representation proceeding**

###### **1. The unit**

The following employees at the Respondent's Rogersville, Tennessee, operation constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All pipe fitters, but excluding all other employees, office clerical employees, sales men, warehousemen, professional employees, guards and supervisors as defined in the Act.

## 2. The certification

On October 27, 1967, a majority of the employees of Respondent in said unit, in an election by secret ballot conducted under the supervision of the Regional Director for Region 10, designated the Union as their representative for the purpose of collective bargaining with Respondent, and on November 6, 1967, the Regional Director for Region 10 certified the Union as the collective-bargaining representative of the employees in said unit and the Union continues to be such representative.

## B. The request to bargain and the Respondent's refusal

Commencing on or about December 4, 1967, and continuing to date, the Union has been requesting the Respondent to bargain collectively with it with respect to wages, hours, and working conditions of the employees in the appropriate unit. At all times since on or about December 7, 1967, Respondent admittedly has refused to recognize and bargain collectively with the Union as exclusive collective-bargaining representative of all employees in said unit.

Accordingly, we find that the Respondent has, since on or about December 7, 1967, refused to bargain collectively with the Union as the exclusive bargaining representative of the employees in the appropriate unit, and that, by such refusal, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

## IV. The Effect of the Unfair Labor Practice upon Commerce

The acts of the Respondent set forth in Section III, above, occurring in connection with its operations as described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes bur-

denying and obstructing commerce and the free flow of commerce.

### The Remedy

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a) (5) and (1) of the Act, we shall order that cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

### Conclusions of Law

1. The Natural Gas Utility District of Hawkins County, Tennessee, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, American Federation of Labor, Local No. 102, is a labor organization within the meaning of Section 2(5) of the Act.

3. All pipe fitters employed at the Respondent's Rogersville, Tennessee, operation, but excluding all other employees, office clerical employees, salesmen, warehousemen, professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since November 6, 1967, the above-named labor organization has been the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about December 7, 1967, and at all times thereafter to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act as amended, the National Labor Relations Board hereby orders that the Respondent, The Natural Gas Utility District of Hawkins County, Tennessee, Rogersville, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning wages, hours, and other terms and conditions of employment, with United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, American Federation of Labor, Local No. 102, as the exclusive bargaining representative of its employees in the following appropriate unit:

All pipe fitters employed at the Respondent's Rogersville, Tennessee, operation, but excluding all other employees, office clerical employees, salesmen, warehousemen, professional employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization, as the exclusive representative of all employees in the aforesaid appropriate unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Rogersville, Tennessee, place of business, copies of the attached notice marked "Appendix". Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notice to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director for Region 10, in writing within 10 days from the date of this Decision and Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D. C.

Frank W. McCulloch, Chairman  
John H. Fanning, Member  
Gerald A. Brown, Member  
Howard Jenkins, Jr., Member  
National Labor Relations Board

(Seal)

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\* In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order," the words "a Decree of the United States Court of Appeals, Enforcing an Order."

## APPENDIX

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### NOTICE TO ALL EMPLOYEES PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not refuse to bargain collectively with United Association Of Journeymen And Apprentices Of The Plumbing And Pipe Fitting Industry Of The United States And Canada, American Federation of Labor, Local No. 102, as the exclusive representative of the employees in the bargaining unit described below.

We Will Not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

We Will, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

All pipe fitters employed at the Employer's Rogersville, Tennessee, operation, but excluding all other employees, office clerical employees, salesmen, warehousemen, professional employees, guards, and supervisors as defined in the Act.

The Natural Gas Utility District of  
Hawkins County, Tennessee  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_

(Representative)

(Title)

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE NATURAL GAS UTILITY DISTRICT OF HAWKINS  
COUNTY, TENNESSEE, RESPONDENT

APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States  
Court of Appeals for the Sixth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, et seq., as amended by 73 Stat. 519), hereinafter called the Act, respectfully applies to this Court for the enforcement of its Order against Respondent, The Natural Gas Utility District of Hawkins County, Tennessee, its officers, agents, successors, and assigns. The proceeding resulting in said Order is known upon the records of the Board as Case No. 10-CA-7213.

In support of this application the Board respectfully shows:

(1) Respondent is engaged in business in the State of Tennessee, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this application by virtue of Section 10(e) of the National Labor Relations Act, as amended.

(2) On February 13, 1968, the General Counsel filed with the Board a Motion for Summary Judgment, asserting that there were no issues of fact or law which had not already been litigated before and determined by the Board in a Decision and Direction of Election in a prior representation case, and requesting an appropriate order remedying the violations as alleged in the complaint. Thereafter, on February 19, 1968, the Board issued an Order transferring proceeding to the Board and notice to show

cause. Thereafter, on November 26, 1968, the Respondent filed its response to notice to show cause, and on April 12, 1968, the Board issued its Decision and Order. On the same date the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank by registered mail to Respondent's Counsel.

(3) Pursuant to Section 10(e) of the National Labor Relations Act, as amended, and pursuant to Rule 17(b) of the Federal Rules of Appellate Procedure, the Board will certify and file with this Court a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceeding before the Board upon which the said Order was entered which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this application and transcript to be served upon Respondent and that this Court take jurisdiction of the proceedings and of the questions determined therein and make and enter upon the pleadings, testimony, and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a judgment enforcing in whole said Order of the Board, and requiring Respondent, its officers, agents, successors, and assigns, to comply therewith.

/s/ Marcel Mallet-Prevost  
MARCEL MALLET-PREVOST  
Assistant General Counsel  
National Labor Relations Board

Dated at Washington, D. C.  
this 26th day of November, 1968.

No. 19,186

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE NATURAL GAS UTILITY DISTRICT OF HAWKINS  
COUNTY, TENNESSEE, RESPONDENT

---

Decided March 17, 1970.

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ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD.

Before WEICK, COMBS and BROOKS,\* Circuit Judges.

WEICK, Circuit Judge. This case is before us on the application of National Labor Relations Board for enforcement of its order issued against The Natural Gas Utility District of Hawkins County, Tennessee [the District], which order found that the District violated Section 8(a) (5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. § 151, et seq), by refusing to bargain with the union certified by the Board as the representative of a unit of the District's pipe fitters. 167 NLRB No. 100 and 170 NLRB No. 156.

The District had refused to bargain with the union on the ground that it (the District) was a political subdivision of the state of Tennessee, therefore it was ex-

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\* The Honorable Henry L. Brooks, then Chief Judge, United States District Court for the Western District of Kentucky, sitting by designation. Judge Brooks has since become a member of this Court.

empt from the operation of the Act and the Board had no jurisdiction over it.<sup>1</sup>

Section 6-2607 of the Tennessee Code, under which the Utility District was organized, provided that a District is a "municipality or public corporation in perpetuity under its corporate name and the same shall be in that name a body politic and corporate with power of perpetual succession, but without any power to levy or collect taxes." [Italics added.]

The Supreme Court of Tennessee construed this statute in *First Suburban Water Util. Dist. v. McCanless*, 177 Tenn. 128, 146 S.W.2d 948 (1941), and held that a District organized under it was a municipal corporation and as such was an arm or instrumentality of the state.

The Board declined to follow the decision of Tennessee's highest court, relying instead on *NLRB v. Randolph Elec. Membership Corp.*, 343 F.2d 60 (4th Cir. 1965), which case involved private non-profit utility corporations organized under the laws of North Carolina, which were formed for the exclusive benefit of their own members, did not have the power of eminent domain, were not subject to substantial control or supervision, and did not exercise any portion of the sovereign power of the state. The Board reasoned:

"The Utility Districts are not created directly by the State. They are formed by petition of property owners upon a County Judge's determination of the feasibility thereof. Thus, the District is no more a direct creation of the State than such privately-owned public service companies as railroads, and

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<sup>1</sup> Section 2(2) of the Act provides:

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization." (29 U.S.C. § 152(2))

motor carriers, which also require some form of governmental approval, such as a certificate of convenience and necessity." (App., p. 15 n. 7)

This reasoning is obviously fallacious because privately owned railroads and motor carriers, even though they may have certificates of convenience and necessity, are operated for profit of their owners, whereas the District is owned and operated by the state, and not for the profit of private individuals. The District, unlike railroads and trucking companies, is a public corporation and was not subject to regulation even by the State Public Utilities Commission, and was exempt from all state taxes.

Reliance by the Board on *Randolph* is misplaced. In *Randolph*, unlike our case, there was no holding by the state's highest court that the private utilities were political subdivisions of the state.

In *Randolph* the private utilities were "formed for the exclusive benefit of its own members." Here, the District was formed for the benefit of the inhabitants of the community.

In *Randolph*, the utilities involved did not have the power of eminent domain. Here, the District not only has the power of eminent domain but also can exercise it over other governmental entities.

The Commissioners of the District further have the power to subpoena witnesses and to administer oaths. The District's records are "public records". The District is required to publish its annual statement in a newspaper of general circulation. Income from its bonds is claimed to be exempt from federal income taxes. Social Security benefits for its employees are voluntary instead of mandatory as the District is considered "a political subdivision" under 42 U.S.C. § 418(5).

In our opinion, it was not necessary that the District be created directly by the state in order to constitute a political subdivision. It is sufficient if the District be created in conformity with state law.

It should be noted that the Act does not require agencies of either federal or state governments to be created directly. As a matter of fact, wholly owned government cor-

porations, including the Federal Reserve Bank and even non-profit hospitals, are specifically exempt.<sup>2</sup>

Under Tennessee law the District is created by petition to the county judge, an elected official, who must find a public convenience and necessity therefor. The county judge appoints the first three commissioners nominated in the petition seeking formation of the District, and fills vacancies in the event the commissioners cannot agree among themselves. In counties having a population of 482,000 or more the commissioners of the Districts are elected at regular general elections. Although the District involved in the present case did not have the requisite number of residents to necessitate the election of its commissioners, this factor indicates that Tennessee considers the functions of a District to be that of a "political subdivision" requiring election of commissioners by the electors when the District encompasses a specified population.

Prior decisions of the Board do not support its holding here. In *Mobile S. S. Ass'n*, 8 NLRB 1297 (1938), the Board held that the State Docks Commission was an exempt political subdivision of the state of Alabama, without discussion of its particular functions or the legal criteria to be applied. In *Oxnard Harbor Dist.*, 34 NLRB 1285 (1941), the Board reviewed extensively the functions of the District and held it was a political subdivision. There was no indication that any particular characteristic was determinative.

In *New Jersey Turnpike Authority*, 2-RC-2245, April 16, 1954, reported unofficially at 33 L.R.R.M. 1528, the Board held that the Turnpike Authority was a political subdivision in view of its powers, duties, and obligations given to it by the state. Three factors were indicated as determinative of the issue, i.e., the administrators were appointed by the Governor; it had the power of eminent domain; and its bonds were tax exempt.

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<sup>2</sup> We disagree with the Board's ruling that because the State does not supervise the District or remove or discipline its commissioners or subordinates, therefore the District is not a political subdivision. We would think that the independence of the District strengthens rather than weakens the proposition that it is a political subdivision.

In *New Bedford, Wood's Hole, Martha's Vineyard, etc. S.S. Authority*, 127 NLRB 1322 (1960), the Authority was established to own and operate a steamship line. The Board was of the opinion that state law, i.e., a determination by the highest court in the state, was controlling on what constitutes a political subdivision. In that case the Board cited *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940), which held:

"True, as was intimated in the *Erie Railroad* case, the highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law . . . ."

The Court in *Randolph* was of the view that this opinion of the Board in *New Bedford* was based on a misconception of the holding of the Supreme Court in *R.F.C. v. Beaver County*, 328 U.S. 204 (1946), on which the Board relied. *NLRB v. Randolph Elec. Membership Corp.*, *supra*, at 63 n. 6. In our opinion, the Board in *New Bedford* did not err in applying the holdings in *West* and *Beaver County*. There was no conflict with national policy. The Board noted, however, in *New Bedford* that there had been no determination in the state courts as to whether the companies were political subdivisions. The Board then proceeded to review certain specific characteristics of the entities before deciding that they were exempt "political subdivisions."

The Board in *New Bedford* indicated that the following factors were important: 1— The members of the Authority were appointed and removed by the Governor with the consent of the executive council; 2— The Authority's bonds were classified as those of the state; 3— The Authority was performing essential governmental functions; 4— The Authority enjoyed tax exempt status; and 5— The bonds were exempt from taxation.

In our opinion, the state has a right to create its own political subdivisions, and when its creations have been held by the state's highest court to constitute political subdivisions, that ought to be binding on federal administrative agencies.

It was the clear intention of Congress not to make amenable to the National Labor Relations Act employees of either federal or state governments. The effect of the order of the Board in the present case may be to extend its jurisdiction over public employees in nearly 270 Utility Districts in Tennessee, which Districts perform a wide variety of public functions.

The Court in *Randolph* gave great weight to the decision of the Board in that case because of the Board's "familiarity with labor problems and its experience in the administration of the Act." *Id.* at 62. In our judgment, the present case involves more of a question of *municipal law* than a *labor problem*, and the decision of the Supreme Court of Tennessee was of controlling importance on the question whether the District was a political subdivision of the state. In our opinion, it was binding on the Board.

Enforcement is denied.

COMBS, Circuit Judge, dissenting. I would grant enforcement on authority of *N.L.R.B. v. Randolph Electric Membership Corporation*, 343 F.2d 60 (4th Cir. 1965). In that case the court upheld the Board's finding that a non-profit corporation organized under the North Carolina Electric Membership Corporation Act was an "employer" within the meaning of 29 U.S.C. § 152(2). In discussing the scope of review of the Board's determination, the court observed at page 62:

"To the extent that it has taken into account economic realities as well as the statutory purposes, the Board's determination is entitled to great respect. [Citing case.] Our function as a reviewing court is limited to determining whether the Board's conclusion has 'warrant in the record' and a 'reasonable basis in law.'"

I think this is the proper standard. Cf. *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968).

Federal law, rather than state legislative or judicial pronouncements, is controlling. *N.L.R.B. v. Hearst Pub-*

*lications*, 322 U.S. 111 (1944); *N.L.R.B. v. Randolph Electric Membership Corporation*, *supra*. In *Randolph*, at page 64, the court said:

"The fact that North Carolina sees fit to characterize such corporations as 'political subdivisions' and to accord them certain benefits in respect to state taxation and otherwise . . . is not decisive . . . since their relation to the state and their actual methods of operation do not fit the label given them."

The Board concluded that the District here involved is not a "political subdivision" of the state because it was neither created directly by the state nor administered by state appointed or publicly elected officials. The Board noted that the District's operations and services do not differ significantly from those of private utilities whose employees are subject to the Act. The District is completely autonomous in the conduct of its daily affairs; the state exercises no supervision and reserves no power to remove or discipline those responsible for its operations.

Although incorporation of utility districts is authorized by an elaborate statutory scheme, respondent's actual creation resulted from the direct efforts of local residents desirous of obtaining the benefits of natural gas. The District's manager testified unequivocally that it is governed by the board of commissioners which adopts rules and regulations necessary to its operation; that the board sets all service rates; that the manager, and ultimately the board hires and fires employees and determines wages; that neither the employees nor the District is controlled in any way by the county or state government.

It is noted that the furnishing of natural gas is the only service provided by this District and this is not necessarily a governmental function.

UNITED STATES COURT OF APPEALS FOR  
THE SIXTH CIRCUIT

No. 19,186

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE NATURAL GAS UTILITY DISTRICT OF HAWKINS  
COUNTY, TENNESSEE, RESPONDENT

[Filed June 5, 1970, Carl W. Reuss, clerk]

ORDER

Before: WEICK, COMBS and BROOKS, Circuit Judges.

This cause came on to be heard on the petition for rehearing en banc, and a majority of the Judges of the Court not having voted in favor of the request for rehearing en banc, the Court finds that said petition for rehearing is not well taken and should be denied. Judges Edwards and Combs voted in favor of rehearing en banc.

It is therefore ORDERED that the petition for rehearing be and it is hereby denied. Judge Combs dissents.

Entered by order of the Court.

CARL W. REUSS.

*Clerk.*

## APPENDIX B

UNITED STATES COURT OF APPEALS FOR  
THE SIXTH CIRCUIT

No. 19,186

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*THE NATURAL GAS UTILITY DISTRICT OF HAWKINS  
COUNTY, TENNESSEE, RESPONDENT

[Filed Mar. 17, 1970, Carl W. Reuss, Clerk]

## ORDER

Before: WEICK, COMBS and BROOKS, Circuit Judges  
On petition to enforce an order of the National Labor  
Relations Board,

This cause came on to be heard on the transcript of  
the record from the National Labor Relations Board,  
and was argued by counsel.

On consideration whereof, it is now ordered, adjudged  
and decreed by this Court that enforcement of the order  
of the National Labor Relations Board is denied.

It is further ordered that Respondent recover from  
Petitioner the costs on appeal as itemized below.

Entered by order of the Court.

CARL W. REUSS,  
*Clerk.*

Issued as Mandate: June 23, 1970.

Costs: None.

A true copy.

Attest:

CARL W. REUSS,  
*Clerk.*

SUPREME COURT OF THE UNITED STATES

No. \_\_\_\_\_, October Term 1970

NATIONAL LABOR RELATIONS BOARD, PETITIONER  
v.

NATURAL GAS UTILITY DISTRICT OF HAWKINS COUNTY,  
TENNESSEE

ORDER EXTENDING TIME TO FILE PETITION  
FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 1, 1970.

/s/ Potter Stewart  
*Associate Justice of the Supreme  
Court of the United States*

Dated this 29th day of August, 1970

SUPREME COURT OF THE UNITED STATES  
No. 785, October Term, 1970

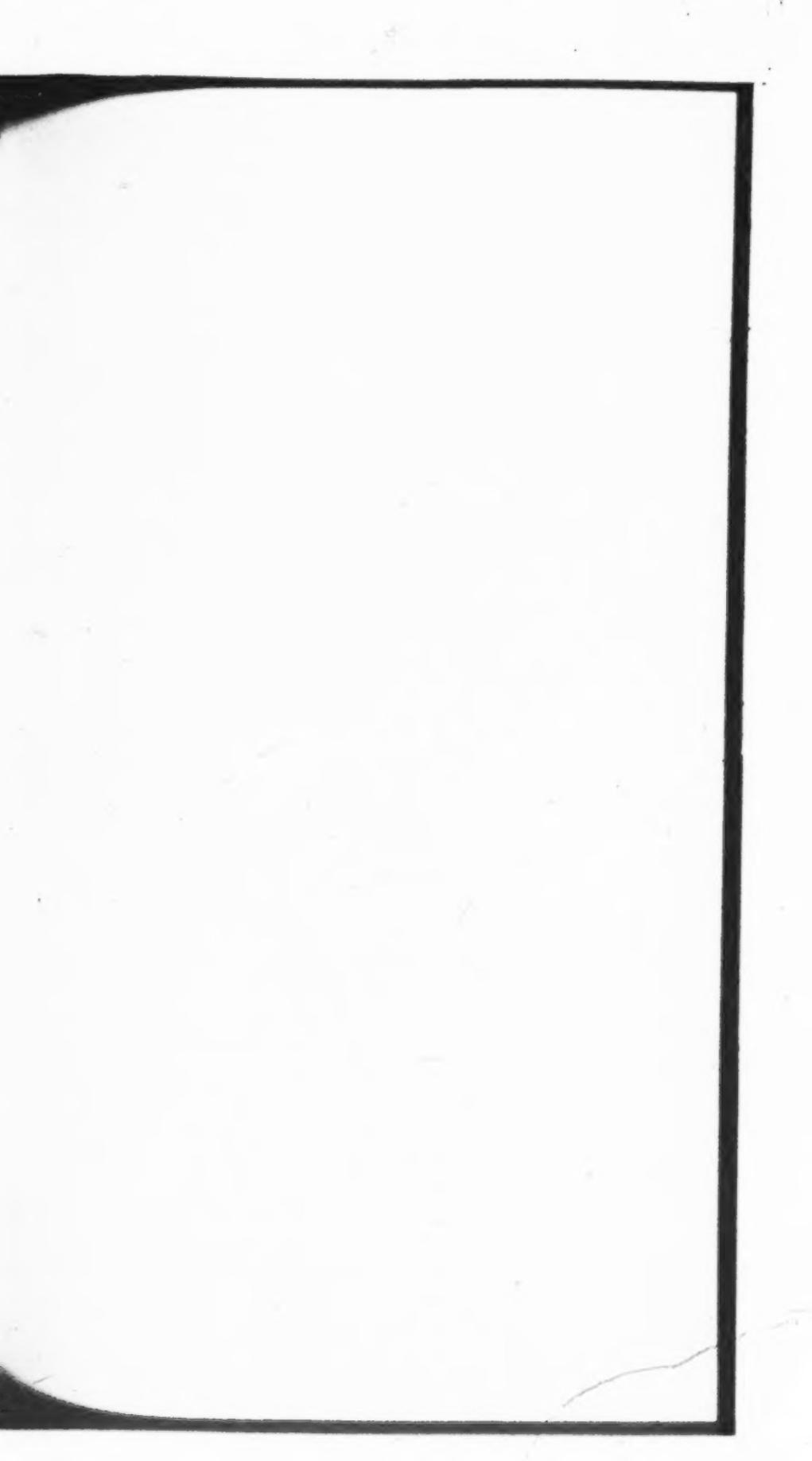
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v.

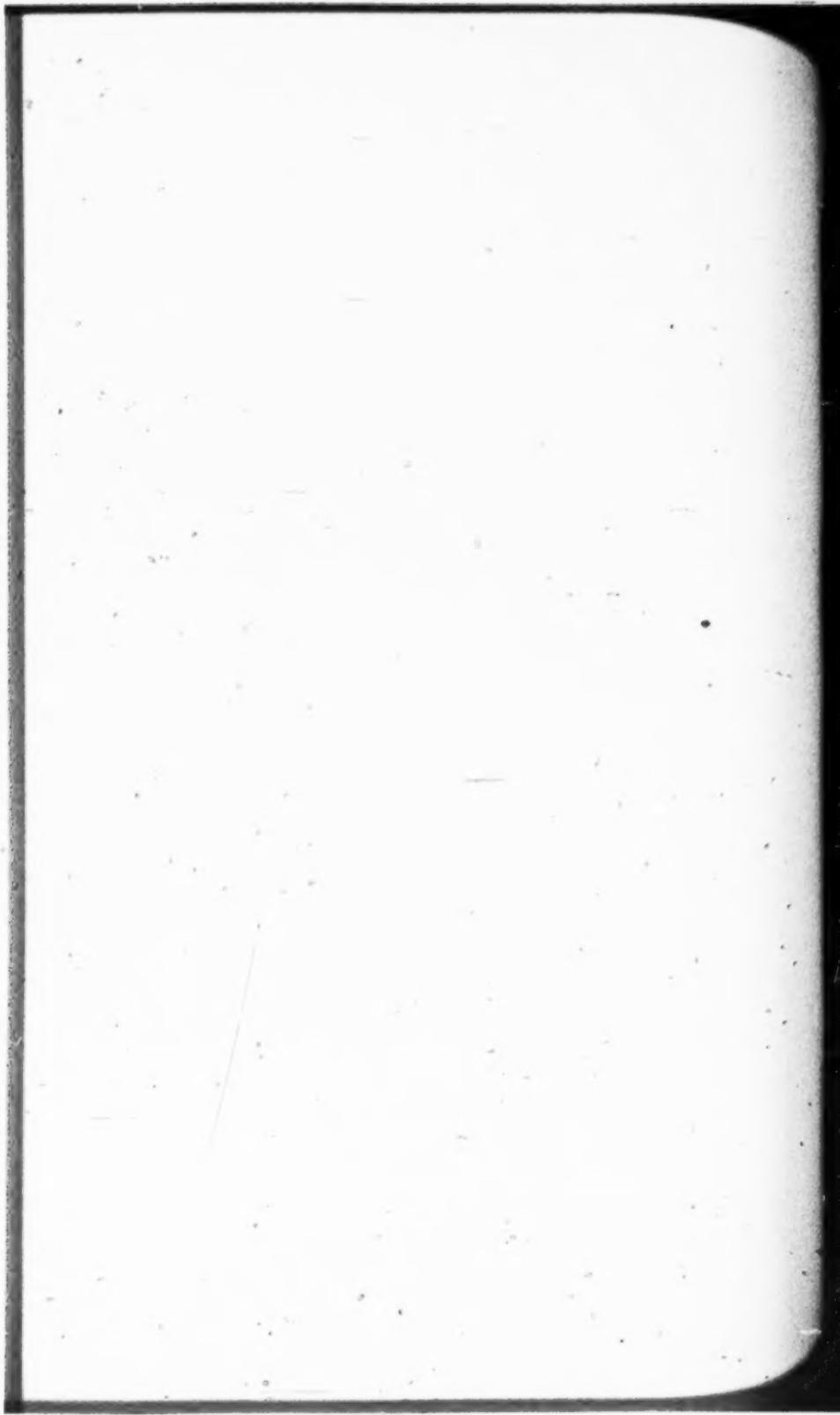
THE NATURAL GAS UTILITY DISTRICT OF HAWKINS  
COUNTY, TENNESSEE

ORDER ALLOWING CERTIORARI

[Filed January 11, 1971.]

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.





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## CITATIONS

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(1)

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In the Supreme Court of the United States

OCTOBER TERM, 1970

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE NATURAL GAS UTILITY DISTRICT OF HAWKINS  
COUNTY, TENNESSEE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

**OPINIONS BELOW**

The opinion of the court of appeals (App. A, *infra*, pp. 13-20) is reported at 427 F. 2d 312. The Board's decision and direction of election in the representation proceeding (App. C, *infra*, pp. 34-40) are reported at 167 NLRB 691. Its decision and order in the ensuing unfair labor practice case (App. C, *infra*, pp. 23-24) are reported at 170 NLRB No. 156.

**JURISDICTION**

The judgment of the court of appeals was entered on March 17, 1970, and the Board's timely petition

for rehearing en banc was denied on June 5, 1970 (App. B, *infra*, pp. 21-22). On August 29, 1970, Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to October 1, 1970.

#### **QUESTIONS PRESENTED**

1. Whether federal rather than state law governs the determination, under Section 2(2) of the National Labor Relations Act, whether an entity created by a state is a "political subdivision" thereof and therefore not an "employer" subject to the Act.
2. Whether the Board properly concluded that the respondent public utility district is not a political subdivision of the State of Tennessee, and whether, under the correct standard of judicial review, the court of appeals should have upheld that determination.

#### **STATUTE INVOLVED**

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

##### **Section 2. When used in this Act—**

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include \* \* \* any State or political subdivision thereof \* \* \*.

\* \* \* \* \*

##### **Section 8(a). It shall be an unfair labor practice for an employer—**

\* \* \* \* \*

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

**STATEMENT****A. THE BOARD'S FINDINGS OF FACT**

On April 24, 1967, the Union<sup>1</sup> filed a petition with the Board, pursuant to Section 9(c) of the National Labor Relations Act, seeking to represent the pipe-fitters employed by the Natural Gas Utility District of Hawkins County, Tennessee (App. C, *infra*, pp. 25, 27-28). The District moved to dismiss the petition on the ground that it was a political subdivision of the State of Tennessee and thus not an employer within the meaning of Section 2(2) of the Act (R. 89-90).<sup>2</sup> The Board rejected this contention and directed that an election be held (App. C, *infra*, pp. 38-40). The Union won the election and was certified as the employees' representative (R. 21, 27). Upon the District's subsequent refusal to recognize and bargain with the Union on the ground that it was not an employer under the Act, the Union filed an unfair labor practice charge which initiated the present case (App. C, *infra*, p. 23). The undisputed facts with respect to the District's status as an employer under the Act are as follows:

The District, which is engaged in the sale and distribution of natural gas, without profit, to residential homes, commercial businesses, and industrial firms in Hawkins County, Tennessee, (App. C, *infra*, p. 35;

<sup>1</sup>United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, American Federation of Labor, Local No. 102.

<sup>2</sup>"R." refers to the joint appendix before the court of appeals, a copy of which has been filed with the petition.

R. 91), was incorporated in December 1957, under the Tennessee Utility District Law of 1937 (R. 98-130). Pursuant to that law, a group of local real property holders in Hawkins County filed a petition with the County Court setting forth a statement of the need for the service to be supplied, an estimate of the cost, and the names of three local residents proposed as commissioners of the District (R. 60-63). Following a hearing, the Chairman of the County Court of Hawkins County approved creation of the District and granted the petition. (App. C, *infra*, p. 37, n. 7; R. 60-64, 95.) As required by the state statute (R. 101), the County Judge appointed as commissioners of the newly created District the three people nominated in the petition (App. C, *infra*, p. 37, n. 8; R. 95-96).

The powers of the District are vested in and exercised by a three-member board of commissioners, who are not subject to state or county regulation (App. C, *infra*, pp. 37-38, R. 93, 95; 117, 106). The commissioners adopt necessary rules or regulations, and set the fees charged for the District's services (R. 93). They also control the labor relations policy of the District. The manager of the District, who is under the supervision of the board of commissioners, hires and fires its employees and sets their wages. (R. 93-94.) Neither the state nor the county has any control over the District's employees, and they are not considered state or county employees (App. C, *infra*, p. 38; R. 94).

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<sup>2</sup> There are about 270 similar utility districts in the state (R. 29, 50).

No public money was utilized in organizing the District; it was financed through the private sale of bonds (R. 97, 65-76). Principal and interest on the bonds are payable solely from the revenues of the District (R. 112). Rates charged by the District must be sufficient to pay its expenses, plus the bond debt as it comes due (R. 113).

The statute under which the District was organized states that a utility district is a "municipality" or public corporation," and specifically exempts it from "state, county and municipal taxation" (R. 101, 113). The Supreme Court of Tennessee has upheld this tax exemption on the ground that utility districts are "arms or instrumentalities" of the state (App. C, *infra*, pp. 35-36).<sup>4</sup> The statute further gives the District the power of eminent domain (R. 104-105), and empowers the board of commissioners to inquire into any matter relating to the affairs of the District and to issue subpoenas and administer oaths for this purpose (App. C, *infra*, p. 38; R. 107). The District, however, has no power to levy or collect taxes and its charges for services are not construed to be taxes (App. C, *infra*, pp. 35-36, n. 2; R. 117).

#### B. THE DECISIONS OF THE BOARD AND THE COURT OF APPEALS

In its initial decision in the representation proceeding (App. C, *infra*, pp. 34-35, 38), the Board rejected the District's contention that it was a political

<sup>4</sup>First Suburban Water Utility District v. McCauley, 177 Tenn. 128, 146 S. W. 2d 948, 950.

subdivision of the State of Tennessee within the meaning of Section 2(2) of the National Labor Relations Act and thus not subject to the Act. The Board noted that the Tennessee statute specifically states that a utility district is a "municipality" or "public corporation" and that the Supreme Court of Tennessee had concluded that such districts are "arms or instrumentalities" of the state, but held that such characterizations are not necessarily controlling in interpreting the National Labor Relations Act. Relying on *National Labor Relations Board v. Randolph Electric Membership Corp.*, 343 F. 2d 60 (C.A. 4), and *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111, for the proposition that the scope of the National Labor Relations Act is to be determined by federal standards and not by the varying declarations and classifications of state law (App. C, *infra*, p. 36, n. 4), the Board examined all the relevant factors and concluded that the District was "an essentially private venture, with insufficient identity with or relationship to the State of Tennessee to support the conclusion that it is an exempt governmental employer under the Act" (App. C, *infra*, p. 37).

In its subsequent decision finding that the District had committed unfair labor practices by refusing to bargain with the Union, the Board relied on its earlier determination that the District was an "employer" covered by the Act (App. C, *infra*, p. 26). Accordingly, the Board held that the District's refusal to bargain with the Union selected by its employees violated Section 8(a) (5) and (1) of the Act (App.

C, *infra*, p. 30). The Board ordered the District to cease and desist from the unfair labor practices found, to bargain with the Union upon request and to post appropriate notices (App. C, *infra*, pp. 31-34).

A divided court of appeals declined to enforce the Board's order (App. A., *infra*, pp. 13-20), ruling that state law is controlling on the issue whether the District is a "political subdivision" within the meaning of Section 2(2) of the Act. Referring to state pronouncements on the issue and the Fourth Circuit's opinion in *Randolph*, *supra*, the court stated (App. A, *infra*, pp. 18-19):

In our opinion, the state has a right to create its own political subdivisions, and when its creations have been held by the state's highest court to constitute political subdivisions that ought to be binding on federal administrative agencies.

\* \* \* \* \*

The Court in *Randolph* gave great weight to the decision of the Board in that case because of the Board's "familiarity with labor problems and its experience in the administration of the Act." [343 F. 2d at 62]. In our judgment, the present case involves more of a question of *municipal law* than a *labor problem*, and the decision of the Supreme Court of Tennessee was of controlling importance on the question whether the District was a political subdivision of the state. In our opinion, it was binding on the Board. [Emphasis in the original.]

**REASONS FOR GRANTING THE WRIT**

1. The holding of the court of appeals below that state rather than federal law governs the determination whether a particular entity is a political subdivision of a state for purposes of the National Labor Relations Act conflicts with the decision of the Fourth Circuit in *National Labor Relations Board v. Randolph Electric Membership Corporation*, 343 F. 2d 60. *Randolph Electric* involved the status under the Act of non-profit public utility membership corporations created pursuant to a similar state (North Carolina) statute. In upholding the Board's determination that the corporations were not state political subdivisions (and hence were employers under the Labor Act), the court rejected the contention that "state law declarations and interpretations should control in determining whether an organization is a 'political subdivision'" (343 F. 2d at 62). The court noted that, although there are instances in which application of particular federal statutes may depend on state law, whether state law applies depends in each case upon the intent of Congress; and it concluded that, with respect to the National Labor Relations Act

\* \* \* it is clear that state law is not controlling and that it is to the actual operations and characteristics of [the utility corporations] that we must look in deciding whether there is sufficient support for the Board's conclusion that they are not "political subdivisions" within the meaning of the National Labor Relations Act. [*Id.* at 63.]

In the present case, on the other hand, the Sixth Circuit stated that this case "involves more a question of *municipal law* than a *labor problem*", and held that the decision "of the Supreme Court of Tennessee" \* \* \* [that] the District was a political subdivision of the state \* \* \* was binding on the Board" (App. A, *infra*, p. 19).<sup>5</sup>

In thus giving the state law determination controlling weight in applying the federal statute, the court below departed from settled principles governing the interpretation of the National Labor Relations Act. Although Congress in Section 2(2) of the National Labor Relations Act has exempted political subdivisions of a state from the coverage of the Act, it has, as with other coverage questions, left it to the Board to formulate the criteria for determining when an entity shall be deemed to be a state instrumentality for purposes of the Act. A state's own characterization of an entity is not decisive for purposes of the Act. For the National Labor Relations Act

is federal legislation, administered by a national agency, intended to solve a national problem.

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<sup>5</sup>The Sixth Circuit sought to distinguish *Randolph* on the ground that, "unlike our case, there was no holding by the state's highest court that the private utilities were subdivisions of the state" (App. A, *infra*, p. 15). But in *Randolph*, there was a specific statutory declaration to that effect by the North Carolina legislature, and several successive State Attorneys General had so held. 343 F. 2d at 62. In addition, the Sixth Circuit relied on the fact that in *Randolph* the corporations lacked any power of eminent domain (App. A, *infra*, p. 15). However, this is not particularly relevant; legislatures "have frequently delegated such power to nonexempt privately-owned and operated public service corporations" (App. C, *infra*, p. 38, and authorities there cited).

lem on a national scale. \* \* \* Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by \*\*\* varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different state standard the respective states may see fit to adopt for the disposition of unrelated, local problems. \*\*\* [National Labor Relations Board v. Hearst Publications, 322 U.S. 111, 123.]

The conflict is one that this Court should resolve. The Court in other contexts frequently has reviewed the question whether federal or state law controls the interpretation and administration of federal statutes and activities. See, e.g., *Clearfield Trust Co. v. United States*, 318 U.S. 363; *United States v. Standard Oil Co.*, 332 U.S. 301; *United States v. Shimer*, 367 U.S. 374; *Free v. Bland*, 369 U.S. 663. Moreover, this particular decision, if allowed to stand, would have an important and adverse impact upon the administration of the National Labor Relations Act.

In addition to the nearly 270 utility districts in Tennessee to which the decision below directly applies, there are a large number of similar entities elsewhere in the country. Since the states tend to characterize those entities as political subdivisions,<sup>6</sup> the de-

<sup>6</sup> See, e.g., N.C. Gen. Stat., Sec. 117-19; Ariz. Const., Art. 13, Sec. 7. See also McQuillin, *Municipal Corporations*, Sections 2.26, 2.27, and 2.29, at pp. 477-487 (3d ed.).

In urging that federal rather than state law determines whether such districts are political subdivisions of a State under the Labor Act, we of course raise no question as to the propriety of such characterization for state law purposes. Nor do we here take any position on whether these districts are or are not political subdivisions under other federal legislation.

cision below, by treating such state characterization as controlling under the Labor Act, is likely to deny the benefits of the Act to a large but indeterminate number of employees of utility districts throughout the country. At the very least, the decision is almost certain to cause substantial litigation.

2. The Board properly concluded that, as a matter of federal law, the District is not a political subdivision of the State of Tennessee. Under the limited scope of judicial review of such agency determinations, the court of appeals should have upheld the ruling. Cf. *Randolph Electric, supra*.

The Board carefully analyzed the legal structure of the District and placed special emphasis on the fact that private individuals, rather than state or county officials, made up the board of commissioners which controlled the operations of the District and were ultimately responsible for the terms and conditions of employment of the District's employees. Weighing these factors in the context of all the other relevant considerations, the Board justifiably concluded that the District was not a "political subdivision." Cf. *Division 1287, Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Employees v. Missouri*, 374 U.S. 74, 81. Whether or not the court below would have reached the same conclusion on its own *de novo* evaluation of the facts, it should have accepted the considered and specialized judgment of the Board on a matter largely within the agency's discretion. See *National Labor Relations Board v. United Insurance Co.*, 390 U.S. 254, 260; *National Labor Relations Board v.*

*Hearst Publications*, 322 U.S. 111, 130-131; *National Labor Relations Board v. Atkins & Co.*, 331 U.S. 398, 403-404, 412-415.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,

*Solicitor General.*

SAMUEL HUNTINGTON,

*Assistant to the Solicitor General.*

ARNOLD ORDMAN,

*General Counsel,*

DOMINICK L. MANOLI,

*Associate General Counsel,*

NORTON J. COME,

*Assistant General Counsel,*

MARION GRIFFIN,

*Attorney,*

*National Labor Relations Board.*

OCTOBER 1970.

## APPENDIX A

United States Court of Appeals for the Sixth Circuit  
No. 19,186

NATIONAL LABOR RELATIONS BOARD, PETITIONER,  
*v.*

THE NATURAL GAS UTILITY DISTRICT OF HAWKINS  
COUNTY, TENNESSEE, RESPONDENT

Decided March 17, 1970

*On Application For Enforcement of an Order of The  
National Labor Relations Board*

Before WEICK, COMBS and BROOKS,\* Circuit Judges

WEICK, Circuit Judge. This case is before us on the application of National Labor Relations Board for enforcement of its order issued against The Natural Gas Utility District of Hawkins County, Tennessee [the District], which order found that the District violated Section 8(a) (5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. § 151, et seq.), by refusing to bargain with the union certified by the Board as the representative of a unit of the District's pipe fitters. 167 NLRB No. 100 and 170 NLRB No. 156.

The District had refused to bargain with the union on the ground that it (the District) was a political

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\*The Honorable Henry L. Brooks, then Chief Judge, United States District Court for the Western District of Kentucky, sitting by designation. Judge Brooks has since become a member of this Court.

subdivision of the state of Tennessee, therefore it was exempt from the operation of the Act and the Board had no jurisdiction over it.<sup>1</sup>

Section 6-2607 of the Tennessee Code, under which the Utility District was organized, provided that a District is a "municipality or public corporation in perpetuity under its corporate name and the same shall be in that name a *body politic and corporate with power of perpetual succession*, but without any power to levy or collect taxes." [Italics added.]

The Supreme Court of Tennessee construed this statute in *First Suburban Water Util. Dist. v. McCanless*, 177 Tenn. 128, 146 S.W.2d 948 (1941), and held that a District organized under it was a municipal corporation and as such was an arm or instrumentality of the state.

The Board declined to follow the decision of Tennessee's highest court, relying instead on *NLRB v. Randolph Elec. Membership Corp.*, 343 F.2d 60 (4th Cir. 1965), which case involved private non-profit utility corporations organized under the laws of North Carolina, which were formed for the exclusive benefit of their own members, did not have the power of eminent domain, were not subject to substantial control

<sup>1</sup> Section 2(2) of the Act provides:

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization." (29 U.S.C. § 152(2))

or supervision, and did not exercise any portion of the sovereign power of the state. The Board reasoned:

"The Utility Districts are not created directly by the State. They are formed by petition of property owners upon a County Judge's determination of the feasibility thereof. Thus, the District is no more a direct creation of the State than such privately-owned public service companies as railroads, and motor carriers, which also require some form of governmental approval, such as a certificate of convenience and necessity." (App., p. 15 n. 7)

This reasoning is obviously fallacious because privately owned railroads and motor carriers, even though they may have certificates of convenience and necessity, are operated for profit of their owners, whereas the District is owned and operated by the state, and not for the profit of private individuals. The District, unlike railroads and trucking companies, is a public corporation and was not subject to regulation even by the State Public Utilities Commission, and was exempt from all state taxes.

Reliance by the Board on *Randolph* is misplaced. In *Randolph*, unlike our case, there was no holding by the state's highest court that the private utilities were political subdivisions of the state.

In *Randolph* the private utilities were "formed for the exclusive benefit of its own members." Here, the District was formed for the benefit of the inhabitants of the community.

In *Randolph*, the utilities involved did not have the power of eminent domain. Here, the District not only has the power of eminent domain but also can exercise it over other governmental entities.

The Commissioners of the District further have the power to subpoena witnesses and to administer oaths. The District's records are "public records". The District is required to publish its annual statement in a newspaper of general circulation. Income from its bonds is claimed to be exempt from federal income taxes. Social Security benefits for its employees are voluntary instead of mandatory as the District is considered "a political subdivision" under 42 U.S.C. § 418(5).

In our opinion, it was not necessary that the District be created directly by the state in order to constitute a political subdivision. It is sufficient if the District be created in conformity with state law.

It should be noted that the Act does not require agencies of either federal or state governments to be created directly. As a matter of fact, wholly owned government corporations, including the Federal Reserve Bank and even non-profit hospitals, are specifically exempt.<sup>2</sup>

Under Tennessee law the District is created by petition to the county judge, an elected official, who must find a public convenience and necessity therefor. The county judge appoints the first three commissioners nominated in the petition seeking formation of the District, and fills vacancies in the event the commissioners cannot agree among themselves. In counties having a population of 482,000 or more the commissioners of the Districts are elected at regular general elections. Although the District involved in the present case did not have the requisite number of resi-

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<sup>2</sup> We disagree with the Board's ruling that because the State does not supervise the District or remove or discipline its commissioners or subordinates, therefore the District is not a political subdivision. We would think that the independence of the District strengthens rather than weakens the proposition that it is a political subdivision.

dents to necessitate the election of its commissioners, this factor indicates that Tennessee considers the functions of a District to be that of a "political subdivision" requiring election of commissioners by the electors when the District encompasses a specified population.

Prior decisions of the Board do not support its holding here. In *Mobile S. S. Ass'n*, 8 NLRB 1297 (1938), the Board held that the State Docks Commission was an exempt political subdivision of the state of Alabama, without discussion of its particular functions or the legal criteria to be applied. In *Oxnard Harbor Dist.*, 34 NLRB 1285 (1941), the Board reviewed extensively the functions of the District and held it was a political subdivision. There was no indication that any particular characteristic was determinative.

In *New Jersey Turnpike Authority*, 2-RC-2245, April 16, 1954, reported unofficially at 33 L.R.R.M. 1528, the Board held that the Turnpike Authority was a political subdivision in view of its powers, duties, and obligations given to it by the state. Three factors were indicated as determinative of the issue, i.e., the administrators were appointed by the Governor; it had the power of eminent domain; and its bonds were tax exempt.

In *New Bedford, Wood's Hole, Martha's Vineyard, etc. S.S. Authority*, 127 NLRB 1322 (1960), the Authority was established to own and operate a steamship line. The Board was of the opinion that state law, i.e., a determination by the highest court in the state, was controlling on what constitutes a political subdivision. In that case the Board cited *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940), which held:

True, as was intimated in the *Erie Railroad* case, the highest court of the state is the final

arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law \*\*\*

The Court in *Randolph* was of the view that this opinion of the Board in *New Bedford* was based on a misconception of the holding of the Supreme Court in *R.F.C. v. Beaver County*, 328 U.S. 204 (1946), on which the Board relied. *NLRB v. Randolph Elec. Membership Corp.*, *supra*, at 63 n. 6. In our opinion, the Board in *New Bedford* did not err in applying the holdings in *West* and *Beaver County*. There was no conflict with national policy. The Board noted, however, in *New Bedford* that there had been no determination in the state courts as to whether the companies were political subdivisions. The Board then proceeded to review certain specific characteristics of the entities before deciding that they were exempt "political subdivisions."

The Board in *New Bedford* indicated that the following factors were important: 1—The members of the Authority were appointed and removed by the Governor with the consent of the executive council; 2—The Authority's bonds were classified as those of the state; 3—The Authority was performing essential governmental functions; 4—The Authority enjoyed tax exempt status; and 5—The bonds were exempt from taxation.

In our opinion, the state has a right to create its own political subdivisions, and when its creations have been held by the state's highest court to constitute political subdivisions, that ought to be binding on federal administrative agencies.

It was the clear intention of Congress not to make amenable to the National Labor Relations Act employees of either federal or state governments. The effect of the order of the Board in the present case

may be to extend its jurisdiction over public employees in nearly 270 Utility Districts in Tennessee, which Districts perform a wide variety of public functions.

The Court in *Randolph* gave great weight to the decision of the Board in that case because of the Board's "familiarity with labor problems and its experience in the administration of the Act." *Id.* at 62. In our judgment, the present case involves more of a question of *municipal law* than a *labor problem*, and the decision of the Supreme Court of Tennessee was of controlling importance on the question whether the District was a political subdivision of the state. In our opinion, it was binding on the Board.

Enforcement is denied.

**COMBS**, Circuit Judge, dissenting. I would grant enforcement on authority of *N.L.R.B. v. Randolph Electric Membership Corporation*, 343 F. 2d 60 (4th Cir. 1965). In that case the court upheld the Board's finding that a non-profit corporation organized under the North Carolina Electric Membership Corporation Act was an "employer" within the meaning of 29 U.S.C. § 152(2). In discussing the scope of review of the Board's determination, the court observed at page 62:

"To the extent that it has taken into account economic realities as well as the statutory purposes, the Board's determination is entitled to great respect. [Citing case.] Our function as a reviewing court is limited to determining whether the Board's conclusion has 'warrant in the record' and a 'reasonable basis in law.' "

I think this is the proper standard. Cf. *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968).

Federal law, rather than state legislative or judicial pronouncements, is controlling. *N.L.R.B. v. Hearst Publications*, 322 U.S. 111 (1944); *N.L.R.B. v. Ran-*

*dolph Electric Membership Corporation*, supra. In *Randolph*, at page 64, the court said:

"The fact that North Carolina sees fit to characterize such corporations as 'political subdivisions' and to accord them certain benefits in respect to state taxation and otherwise \* \* \* is not decisive \* \* \* since their relation to the state and their actual methods of operation do not fit the label given them."

The Board concluded that the District here involved is not a "political subdivision" of the state because it was neither created directly by the state nor administered by state appointed or publicly elected officials. The Board noted that the District's operations and services do not differ significantly from those of private utilities whose employees are subject to the Act. The District is completely autonomous in the conduct of its daily affairs; the state exercises no supervision and reserves no power to remove or discipline those responsible for its operations.

Although incorporation of utility districts is authorized by an elaborate statutory scheme, respondent's actual creation resulted from the direct efforts of local residents desirous of obtaining the benefits of natural gas. The District's manager testified unequivocally that it is governed by the board of commissioners which adopts rules and regulations necessary to its operation; that the board sets all service rates; that the manager, and ultimately the board, hires and fires employees and determines wages; that neither the employees nor the District is controlled in any way by the county or state government.

It is noted that the furnishing of natural gas is the only service provided by this District and this is not necessarily a governmental function.

## APPENDIX B

### UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 19,186

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE NATURAL GAS UTILITY DISTRICT OF HAWKINS  
COUNTY, TENNESSEE, RESPONDENT

[Filed Mar. 17, 1970, Carl W. Reuss, clerk]

#### *Order*

Before: WEICK, COMBS and BROOKS, Circuit Judges

On petition to enforce an order of the National  
Labor Relations Board,

This cause came on to be heard on the transcript of  
the record from the National Labor Relations Board,  
and was argued by counsel.

On consideration whereof, it is now ordered, ad-  
judged and decreed by this Court that enforcement of  
the order of the National Labor Relations Board is  
denied.

It is further ordered that Respondent recover from  
Petitioner the costs on appeal as itemized below.

Entered by order of the Court.

CARL W. REUSS,  
*Clerk.*

Issued as Mandate: June 23, 1970.

Costs: None.

A true copy.

Attest:

CARL W. REUSS,  
*Clerk.*

UNITED STATES COURT OF APPEALS FOR  
THE SIXTH CIRCUIT

No. 19,186

NATIONAL LABOR RELATIONS BOARD, PETITIONER  
*v.*

THE NATURAL GAS UTILITY DISTRICT OF HAWKINS  
COUNTY, TENNESSEE, RESPONDENT

[Filed June 5, 1970, Carl W. Reuss, clerk]

*Order*

Before: WEICK, COMBS and BROOKS, Circuit Judges.  
This cause came on to be heard on the petition for rehearing en banc, and a majority of the Judges of the Court not having voted in favor of the request for rehearing en banc, the Court finds that said petition for rehearing is not well taken and should be denied. Judges Edwards and Combs voted in favor of rehearing en banc.

It is therefore ORDERED that the petition for rehearing be and it is hereby denied. Judge Combs dissents.

Entered by order of the Court.

CARL W. REUSS.

*Clerk.*

APPENDIX C  
United States of America  
Before the  
National Labor Relations Board  
Case No. 10-CA-7213

**THE NATURAL GAS UTILITY DISTRICT OF HAWKINS  
COUNTY, TENNESSEE**

*and*

**UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AMERICAN FEDERATION OF LABOR, LOCAL NO. 102**

**DECISION AND ORDER**

Upon a charge filed by United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, American Federation of Labor, Local No. 102, herein called the Union, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 10, issued a complaint dated February 1, 1968, against The Natural Gas Utility District of Hawkins County, Tennessee, herein called the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a) (5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended.

Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served on the parties to this proceeding.

The complaint alleges, in substance, that on November 6, 1967, the Union was duly certified as the exclusive bargaining representative of the Respondent's employees in an appropriate unit, and that, on or about December 7, 1967, and thereafter, the Respondent refused to recognize or bargain with the Union as such exclusive bargaining representative, although the Union requested the Respondent to do so. On February 6, 1968, Respondent filed its answer to the complaint, in which it admitted in part and denied in part the allegations contained therein, and requested that the complaint be dismissed.

On February 16, 1968, the General Counsel filed with the Board a Motion for Summary Judgment, asserting that there were no issues of fact or law which had not already been litigated before and determined by the Board in a Decision and Direction of Election in a prior representation case,<sup>1</sup> and requesting an appropriate order remedying the violations as alleged in the complaint. Thereafter, on February 19, 1968, the Board issued an Order Transferring Proceeding to the Board and Notice to Show Cause why General Counsel's Motion for Summary Judgment should not be granted. Pursuant thereto, Respondent filed a Response to the Notice to Show Cause with a supporting Memorandum.

Upon the entire record in this case, the Board makes the following:

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<sup>1</sup> 167 NLRB No. 100.

**RULING ON THE MOTION FOR SUMMARY JUDGMENT**

The record establishes that pursuant to a petition filed by the Union on April 24, 1967, in the abovementioned representation case, a hearing was held before a Hearing Officer of the Board on June 19, 1967, at the close of which the proceeding was transferred to the Board. The Respondent denied that its operations were within the Board's statutory jurisdiction, contending that it was and is an exempt political subdivision of the State of Tennessee. On October 6, 1967, the Board issued its Decision and Direction of Election in which jurisdiction was asserted. On October 19, 1967, the Respondent filed with the Board a motion for further hearing on the jurisdictional issue. The Board, having duly considered the matter, denied the motion on October 24, 1967.

On October 27, 1967, an election was held, in which a majority of the valid ballots were cast for the Union. No objections having been filed, the Union was certified on November 6, 1967.

By letter dated December 4, 1967, the Union requested the Respondent to bargain collectively. Respondent, by letter dated December 7, 1967, refused to bargain collectively with the Union, and on January 10, 1968, the Union filed the charge upon which these proceedings are predicated.

In its Response to the Notice to Show Cause, Respondent predicates its refusal to bargain solely upon its denial of the Board's jurisdiction. Respondent alleges that it is not an "employer" as defined in Section 2(2) of the Act, but rather, a political subdivision of the State of Tennessee. Respondent accordingly contests the validity of the Board-conducted election and the Certification of Representative based thereon.

It is well settled that in the absence of newly discovered or previously unavailable evidence, a respondent in a section 8(a)(5) proceeding is not entitled to relitigate issues which were or could have been raised in the prior representation proceeding.<sup>7</sup> As all contentions now made were raised at the earlier hearing in the representation case,<sup>8</sup> and were considered and rejected by the Board, and as all factual allegations of the complaint are admitted by Respondent's answer to the complaint or stand admitted by the failure of Respondent to controvert the averments of the General Counsel's motion, there are no matters in issue requiring a hearing before a Trial Examiner. Accordingly, the General Counsel's Motion for Summary Judgment is granted.

On the basis of the record before it, the Board makes the following:

<sup>7</sup> *Pittsburgh Plate Glass Company v. N.L.R.B.*, 313 U.S. 146; *N.L.R.B. v. Aerovox Corp.*, F. 2d (C.A. 4, January 29, 1968); *The Sheffield Corporation*, 163 NLRB No. 34; and *Collins & Aikman Corp.*, 160 NLRB 1750.

<sup>8</sup> The Respondent's contention that the decision in *The West Tennessee Public Utility District of Weakley, Carroll and Benton Counties, Tennessee*, 26 RC 2972 (not published in NLRB volumes), is in conflict with and requires reversal of the Board's Decision and Direction of Election in the prior representation case is without merit. That case was decided on September 1, 1967, by the Regional Director for Region 26, who found that the employer therein was a political subdivision of the State of Tennessee and not an "employer" within the meaning of Section 2(2) of the Act. However, no Request for Review by the Board was filed by any party thereto. Accordingly, the Board had no occasion to affirm or reject that holding, and it is not controlling in the instant matter.

**FINDINGS OF FACT****I. THE BUSINESS OF THE RESPONDENT**

Respondent is incorporated under the provisions of the Tennessee Utility District Act and maintains its principal office and place of business at Rogersville, Tennessee, where it is engaged in the sale and distribution of natural gas to residential houses, commercial businesses, and industrial firms located in Hawkins County, Tennessee. During the course and conduct of its business operations for the preceding calendar year, the Respondent purchased and received goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of Tennessee. During the same period of time, the Respondent received gross revenue valued in excess of \$250,000. We find that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

**II. THE LABOR ORGANIZATION INVOLVED**

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, American Federation of Labor, Local No. 102, is a labor organization within the meaning of Section 2(5) of the Act.

**III. THE UNFAIR LABOR PRACTICES***A. The representation proceeding**1. The unit*

The following employees at the Respondent's Rogersville, Tennessee, operation constitute a unit ap-

propriate for collective bargaining within the meaning of Section 9(b) of the Act:

All pipe fitters, but excluding all other employees, office clerical employees, sales men, warehousemen, professional employees, guards and supervisors as defined in the Act.

## 2. The certification

On October 27, 1967, a majority of the employees of Respondent in said unit, in an election by secret ballot conducted under the supervision of the Regional Director for Region 10, designated the Union as their representative for the purpose of collective bargaining with Respondent, and on November 6, 1967, the Regional Director for Region 10 certified the Union as the collective-bargaining representative of the employees in said unit and the Union continues to be such representative.

### *B. The request to bargain and the Respondent's refusal*

Commencing on or about December 4, 1967, and continuing to date, the Union has been requesting the Respondent to bargain collectively with it with respect to wages, hours, and working conditions of the employees in the appropriate unit. At all times since on or about December 7, 1967, Respondent admittedly has refused to recognize and bargain collectively with the Union as exclusive collective-bargaining representative of all employees in said unit.

Accordingly, we find that the Respondent has, since on or about December 7, 1967, refused to bargain collectively with the Union as the exclusive bargain-

ing representative of the employees in the appropriate unit, and that, by such refusal, the Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

#### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICE UPON COMMERCE

The acts of the Respondent set forth in Section III, above, occurring in connection with its operations as described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### THE REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

#### CONCLUSIONS OF LAW

1. The Natural Gas Utility District of Hawkins County, Tennessee, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of

the United States and Canada, American Federation of Labor, Local No. 102, is a labor organization within the meaning of Section 2(5) of the Act.

3. All pipe fitters employed at the Respondent's Rogersville, Tennessee, operation, but excluding all other employees, office clerical employees, salesmen, warehousemen, professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since November 6, 1967, the above-named labor organization has been the exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about December 7, 1967, and at all times thereafter to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act as amended, the National Labor Relations Board hereby orders that the Respondent, The Natural Gas Utility District of Hawkins County, Tennessee, Rogersville, Tennessee, its officers, agents, successors, and assigns, shall:

**1. Cease and desist from:**

(a) Refusing to bargain collectively concerning wages, hours, and other terms and conditions of employment, with United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, American Federation of Labor, Local No. 102, as the exclusive bargaining representative of its employees in the following appropriate unit:

All pipe fitters employed at the Respondent's Rogersville, Tennessee, operation, but excluding all other employees, office clerical employees, salesmen, warehousemen, professional employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

**2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:**

(a) Upon request, bargain with the above-named labor organization, as the exclusive representative of all employees in the aforesaid appropriate unit, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and if an understand-

ing is reached, embody such understanding in a signed agreement.

(b) Post at its Rogersville, Tennessee, place of business, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify said Regional Director for Region 10, in writing within 10 days from the date of this Decision and Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C.

FRANK W. McCULLOCH,

*Chairman,*

JOHN H. FANNING,

*Member,*

GERALD A. BROWN,

*Member,*

HOWARD JENKINS, JR.

*Member,*

National Labor Relations Board.

(Seal)

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\* In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "a Decision and Order," the words "a Decree of the United States Court of Appeals, Enforcing an Order."

## APPENDIX

**NOTICE TO ALL EMPLOYEES  
PURSUANT TO  
A DECISION AND ORDER**

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not refuse to bargain collectively with United Association Of Journeymen And Apprentices Of The Plumbing And Pipe Fitting Industry Of The United States And Canada, American Federation of Labor, Local No. 102, as the exclusive representative of the employees in the bargaining unit described below.

We Will Not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

We Will, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

All pipe fitters employed at the Employer's Rogersville, Tennessee, operation, but excluding all other employees, office clerical employees, salesmen, warehousemen, professional employ-

ees, guards, and supervisors as defined in the Act.

**The Natural Gas Utility District of  
Hawkins County, Tennessee**  
(Employer)

Dated ----- By -----  
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, 730 Peachtree Street, N. E., Room 701, Atlanta, Georgia 30308, Telephone Number 526-5760, if they have any question concerning this notice or compliance with its provisions.

**DECISION AND DIRECTION OF ELECTION**

**(Case No. 10-RC-7070)**

Upon a petition duly filed under Section 9(e) of the National Labor Relations Act, as amended, a hearing was held before George L. Card, Jr., Hearing Officer. Thereafter, the Employer and the Petitioner filed briefs.

The National Labor Relations Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this case, the National Labor Relations Board finds:

1. The Employer, also referred to as the District, moved to dismiss the petition on grounds that, as an exempt political subdivision of the State of Tennessee, the Board may not assert jurisdiction herein. In rejecting this contention, we find that the Employer

is not a political subdivision within the meaning of Section 2(2) the National Labor Relations Act, as amended.<sup>1</sup>

In this connection, the facts show that the Employer was incorporated in December 1957 under the provisions of the Tennessee Utility District Act and is engaged in the sale and distribution of natural gas to residential houses, commercial businesses, and industrial firms, all of which are located within Hawkins County, Tennessee.

The Respondent is organized to supply gas utility service without pecuniary profit. The Respondent conducts its business without supervision of the State or any political subdivision thereof. It hires its own employees, and sets their terms and conditions of employment. It also has the usual powers of a private corporation, e.g., it may sue and be sued, incur obligations, issue bonds, sell and encumber its property, and enter into contracts necessary or convenient to the exercise of the powers granted to it.

The Respondent contends, however, that it is not the customary public utility inasmuch as the Tennessee statute under which it is organized specifically declares that a utility district is a "municipality" or "public corporation,"<sup>2</sup> and the Supreme Court of

<sup>1</sup>Section 2(2) reads in material part: "The term 'employer' \*\*\* shall not include \* \* \* any State or political subdivision thereof. \* \* \*"

<sup>2</sup>Tennessee Code, title 6, ch. 26, sec. 7, District as municipality—Powers.

From and after the date of the making and filing of such order of incorporation, the district so incorporated shall be a "municipality" or public corporation in perpetuity under its corporate name and the same shall in that name be a body politic and corporate with power of perpetual succession, but without any power to levy or collect taxes.

Tennessee has held that utility districts are "arms or instrumentalities" of the State of Tennessee.<sup>3</sup> However, while such state law declarations and interpretations are given careful consideration by the Board, they are not necessarily controlling.<sup>4</sup> Rather, the determination of whether a particular entity falls within the exemption for political subdivisions entails an assessment of all relevant factors. Upon examination of the instant record in the light of the "economic

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Charges for services authorized herein, shall not be construed as taxes. The powers of each district shall be vested in and exercised by a majority of the members of the Board of commissioners of the district. So long as the district continues to furnish any of the services which it is herein authorized to furnish, it shall be the sole public corporation empowered to furnish such services in the district unless and until it shall have been established that the public convenience and necessity requires other or additional services. [Acts 1937, ch. 248, sec. 3; C. Supp. 1950, sec. 3695, 28.]

<sup>3</sup> First Suburban Water Utility Dist. v. McCanless, 177 Tenn. 128, 146 S. W. 2d 948 (1941).

<sup>4</sup> In N.L.R.B. v. Randolph Electric Membership Corporation and N.L.R.B. v. Tri-County Electric Membership Corporation, 343 F. 2d 60, 62 (C.A. 4), the Court, in sustaining the Board's finding that the companies were not "political subdivisions" despite the State legislature's declaration to the contrary and similar interpretations by State Attorney Generals, held:

"In the absence of a plain indication to the contrary, however, it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on State law."

In accord: N.L.R.B. v. Hearst Publications, 322 U. S. 111, 123 (1944), ". . . Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by . . . varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective States may see fit to adopt for the disposition of unrelated, local problems."

realities and statutory purposes,"<sup>5</sup> we are satisfied that the Employer exists as an essentially private venture, with insufficient identity with or relationship to the State of Tennessee to support the conclusion that it is an exempt governmental employer under the Act. Thus, unlike the usual situation where jurisdiction has been declined on political subdivision grounds,<sup>6</sup> the Employer in this case is neither created directly by the State,<sup>7</sup> nor administered by State-appointed or elected officials.<sup>8</sup> Furthermore, its operations and services do not differ significantly from those of enterprises in private industry including

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<sup>5</sup> See Randolph, *supra*, at p. 62.

<sup>6</sup> See, e.g., Mobile Steamship Association, et al., 8 NLRB 1297, where the State Docks Commission, one of the employers, was created by specific legislation of the State of Alabama; Oxnard Harbor District, 34 NLRB 1285, a harbor district organized by district residents under a general enabling act of California, but governed by a board of commissioners elected for a term of office by qualified voters of the district; New Jersey Turnpike Authority, 2-RC-2245, April 16, 1954, an authority specifically created by the Legislature and governed by members appointed by the Governor with advice and consent of the Senate; New Bedford, Woods Hole, Martha's Vineyard, and Nantucket Steamship Authority, 127 NLRB 1322, a body corporate created by Massachusetts, consisting of members appointed and removed by the Governor with the advice and consent of the Executive Council.

<sup>7</sup> The Utility Districts are not created directly by the State. They are formed by petition of property owners upon a County Judge's determination of the feasibility thereof. Thus, the District is no more a direct creation of the State than such privately-owned public service companies as railroads, and motor carriers, which also require some form of governmental approval, such as a certificate of convenience and necessity.

<sup>8</sup> The County Judge exercises no independent discretion in naming the members of the Board of Commissioners. He must by statute appoint those persons nominated in the petition seeking formation of a district.

utilities whose employees are entitled to the benefits of the Act. The Employer is completely autonomous in the conduct of its day-to-day affairs, with the State exercising no supervisory role with respect thereto, or reserving any power to remove or otherwise discipline those responsible for the Employer's operations. In these circumstances, we are satisfied that the State pronouncements are not determinative of the public nature of the Employer's functions and activities. We are also not persuaded that mere possession of the power of eminent domain which, as here, has been conferred in aid of a venture which is essentially private in nature, requires us to find that the Employer constitutes a political subdivision under Section 2(2) of the Act. In this regard, we think it significant that legislatures have frequently delegated such power to non-exempt privately-owned and operated service corporations.<sup>9</sup> Indeed, the Tennessee Legislature itself has delegated such authority to private corporations.<sup>10</sup>

In these circumstances we find that the District is an Employer within the meaning of Section 2(2) of the National Labor Relations Act, as amended. Accordingly, and as the record shows and the parties agree that the Employer's operations satisfy the Board's commerce standards for public utilities, we

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<sup>9</sup> N. C. Public Service Co. v. Southern Power Co., 282 F[ed.] . . . 837 (C.A. 4), writ of cert. denied, 263 U. S. 508; Whiting Mfg. Co. v. Carolina Aluminum Co., 207 N. C. 52, 175 S. E. 698; Berry v. Southern Pine Electric Power Assn., 222 Miss. 260, 76 So. 2d 212; Bookhart v. Central Electric Power Coop. 219 S. C. 414, 65 S. E. 2d 781, as explained in Black River Electric Coop. v. Public Service Commission, 238 S. C. 232, 120 S. E. 2d 6, 12; Hagans v. Excelsior Electric Membership Corp., 207 Ga. 53, 60 S. E. 2d 162; Alabama Power Co. v. Cullman County Electric Membership Corp., 234 Ala. 396, 174 So. 866.

<sup>10</sup> Tennessee Code, title 48, ch. 1, sec. 1, et seq.

find that the Employer is engaged in commerce within the meaning of the Act.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(e)(1) and Section 2(6) and (7) of the Act.

4. In accordance with the parties' stipulation, we find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All pipe fitters employed at the Employer's Rogersville, Tennessee, operation, but excluding all other employees, office clerical employees, salesmen, warehousemen, professional employees, guards, and supervisors as defined in the Act.

#### DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the unit found appropriate, as early as possible, but not later than 30 days from the date below. The Regional Director for Region 10 shall direct and supervise the election, subject to the National Labor Relations Board Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the

military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.<sup>11</sup> Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, American Federation of Labor, Local Union No. 102.

Dated, Washington, D.C., Oct. 6, 1967.

**FRANK W. McCULLOCH,**

*Chairman,*

**JOHN H. FANNING,**

*Member,*

**GERALD A. BROWN,**

*Member,*

**HOWARD JENKINS, JR.,**

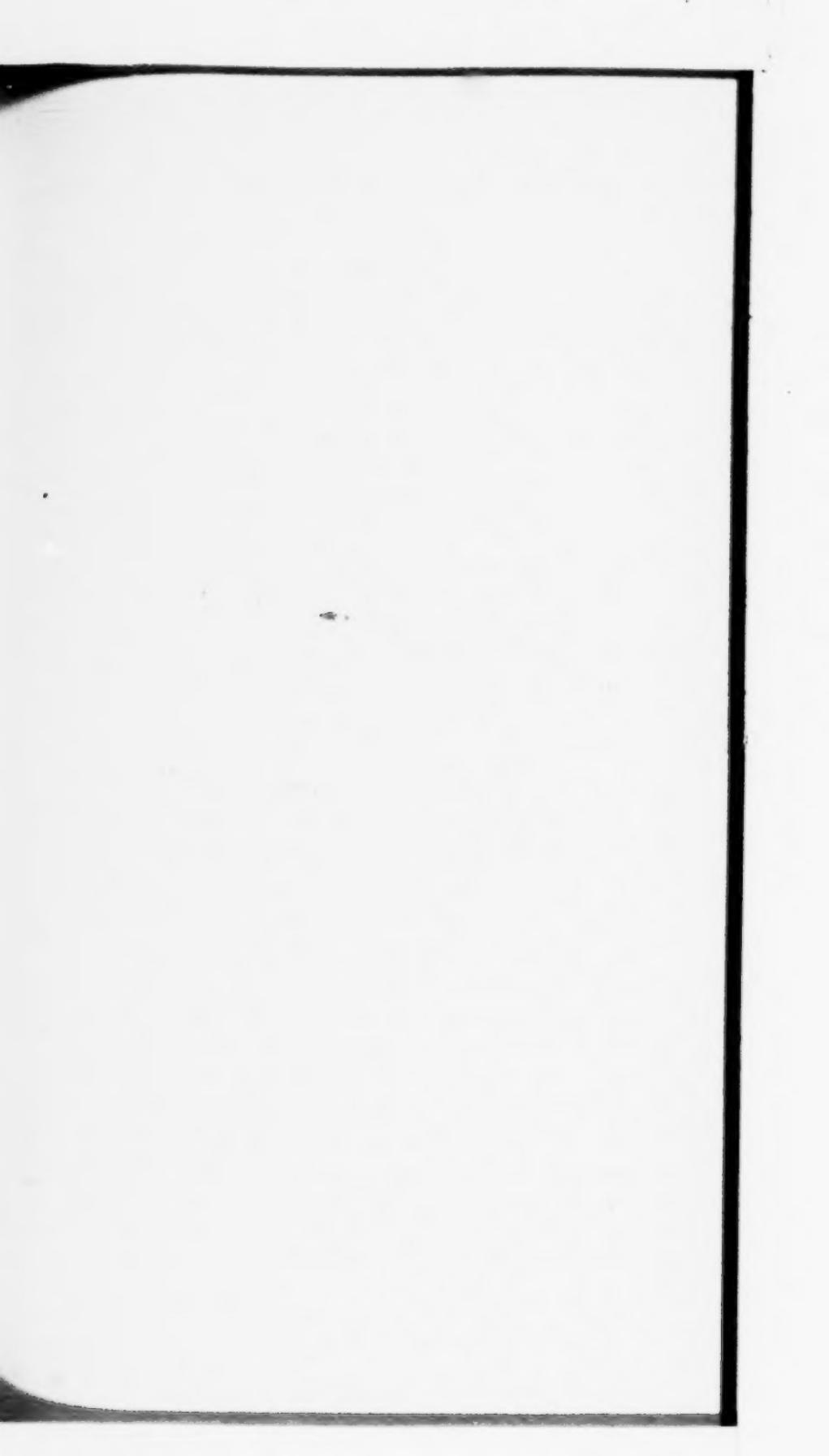
*Member,*

(Seal)

**National Labor Relations Board.**

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<sup>11</sup> An election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 10 within 7 days after the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *Excelsior Underwear Inc.*, 156 NLRB 1236.





E. ROBERT BEAVER, CL

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1970

No. **785**

**NATIONAL LABOR RELATIONS BOARD,**  
Petitioner,

vs.

**THE NATURAL GAS UTILITY DISTRICT OF  
HAWKINS COUNTY, TENNESSEE,**  
Respondent.

**BRIEF OF RESPONDENT IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**Eugene Greenier, Jr.**

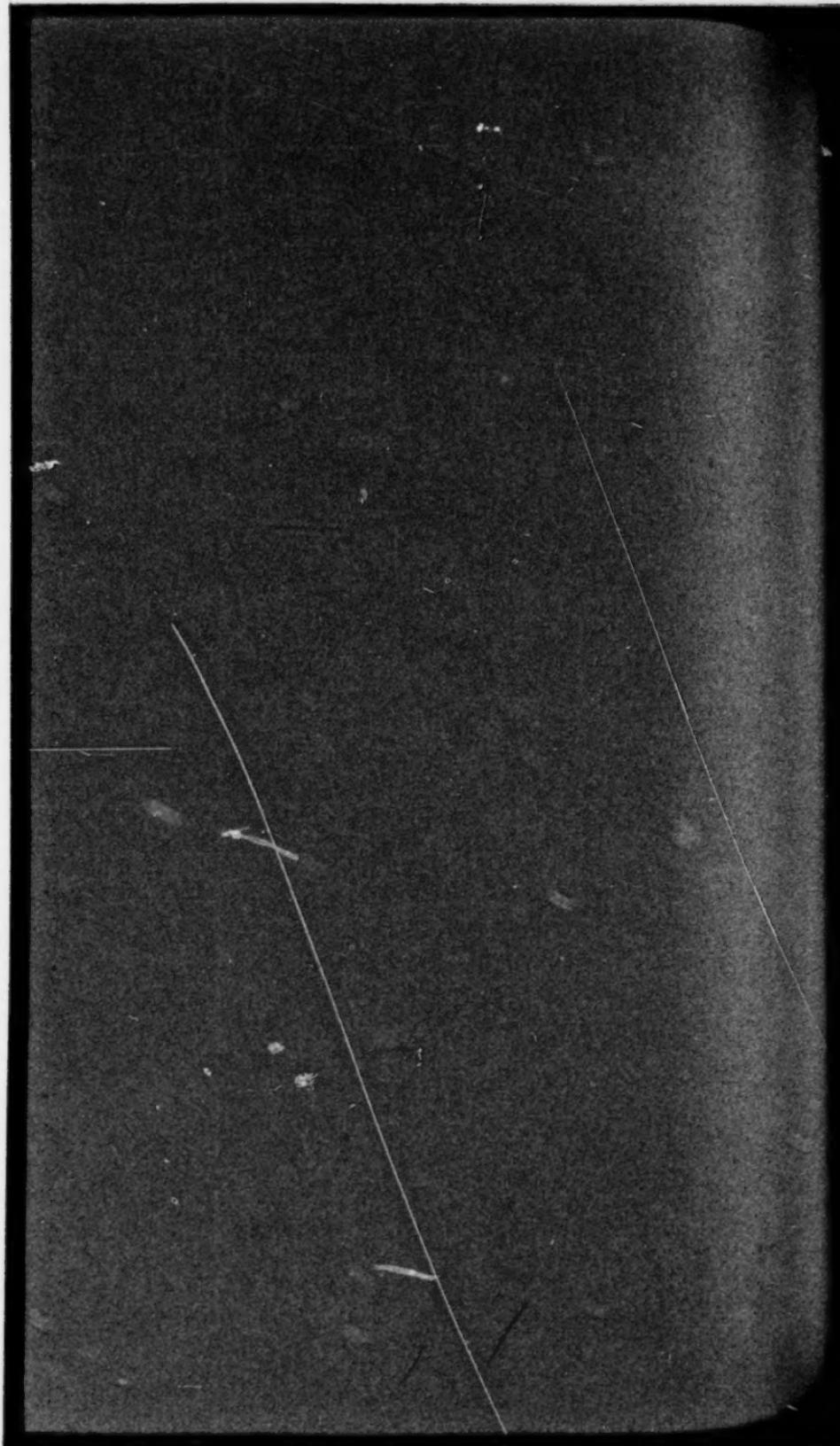
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District of Hawkins County, Ten-  
nessee—Respondent



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IN THE  
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NATIONAL LABOR RELATIONS BOARD,  
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**BRIEF OF RESPONDENT IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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**INTRODUCTION**

The respondent, The Natural Gas Utility District of Hawkins County, Tennessee, respectfully urges that the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, filed herein on behalf of the National Labor Relations Board, be denied.

The only question presented is whether the decision of the Court of Appeals for the Sixth Circuit below is in conflict with the decision of the Court of Appeals for the Fourth Circuit in *National Labor Relations Board v. Randolph Electric Membership Corp.*, 343 F.2d 60 (1965).

It is submitted, that for the reasons set forth herein-after, there is no conflict between the two decisions, and, accordingly, the petition should be denied.

I.

**ANSWER TO "QUESTIONS PRESENTED"**

Respondent disagrees with petitioner's statement of the "questions presented."

The question presented here is not "Whether federal law rather than state law governs the determination, under Section 2(2) of the National Labor Relations Act, whether an entity created by a state is a 'political subdivision' thereof and therefore not an 'employer' subject to the Act." Neither is it "Whether the Board properly concluded that the respondent public utility district is not a political subdivision of the State of Tennessee, and whether, under the correct standard of judicial review, the court of appeals should have upheld that determination."

The reasons considered by this Honorable Court in deciding whether or not to grant a petition for a writ of certiorari are set forth in Rule 19 of the rules of this Court.

The only reason for granting such a writ alluded to in the contents of the petition herein is that set forth in Rule 19(1)(b) as follows:

"Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter."

Thus, the only question here presented is whether the decision of the court of appeals below is in conflict with the decision of the Fourth Circuit Court of Appeals in the *Randolph* case, *supra*, on the same matter.

As explained hereinafter, the two decisions did not consider "the same matter," and, in any event, the court of appeals below decided this case in accordance with the rule in the *Randolph* case, merely distinguishing the facts here involved.

It is submitted that what petitioner has done in its petition is to take the last several sentences from the full opinion of the court of appeals below and presented the same so as to try to create a conflict in the two decisions.

It is submitted that a conflict in decisions which would be the basis for granting the petition for certiorari does not exist.

## II.

### **ANSWER TO "STATEMENT"**

#### **A. The Board's Findings of Fact.**

Respondent only partially agrees with this portion of petitioner's brief. On page 3 of its brief, petitioner states:

"The undisputed facts with respect to the District's status as an employer under the Act are as follows."

The petitioner then sets out a few facts, also some argumentative conclusions, but does not list many other undisputed facts in this record with respect to the District's status as an employer under the Act.

Respondent desires to set out the following additional undisputed facts:

(a) The Natural Gas Utility District of Hawkins County, Tennessee is only one of nearly 270 utility districts in the 95 counties in the State of Tennessee (R. 50).<sup>1</sup>

(b) Any district established under the Utility District Law of 1937 (R. 98-130) is specifically empowered under §6-2608, Tennessee Code Annotated, "to conduct, operate and maintain a system or systems for the furnishing of water, sewer, sewage disposal, natural gas, artificial gas, police, fire protection, garbage collection and garbage disposal, street lighting, parks and recreational facilities, transit facilities, etc., or two or more of such systems—and to carry out such purpose will have the power and authority to acquire, construct, reconstruct, improve, better, extend, consolidate, maintain and operate such system or systems within or without the district - - -" (R. 120).

(c) The Utility District Act was passed by the Tennessee legislature to provide a municipal corporate arrangement to furnish certain needed governmental services usually in small towns and rural areas, including, but not limited to, the foregoing listed services; these services were not, and, usually could not be, otherwise provided (R. 51); §6-2607, T.C.A., provides that the district, when formed, "shall be the sole public corporation empowered to furnish such services," so long as the district continues to furnish any of the services which it is herein authorized to furnish (R. 117).

(d) The legislature further provided in §6-2607, T.C.A., that: "From and after the date of the making and filing of such order of incorporation, the district so incorporated shall be 'a municipality' or public corporation in perpetuity - - -."

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1. "R." refers to the joint appendix before the Court of Appeals, a copy of which was filed with the petition.

(e) The county judge who appoints the first commissioners, and who fills vacancies in the event the commissioners cannot agree among themselves, is the top governing official in each county and is himself a publicly elected official (R. 86).

(f) Commissioners serve with only very nominal compensation (R. 126).

(g) So long as a district shall own any system, its property and revenue are exempt from all state, county and municipal taxation, and its bonds are also so exempt, except for estate, inheritance and transfer taxes (R. 113).

(h) By §6-2613, T.C.A., utility districts are specifically exempt from state regulation by the Tennessee Railroad and Public Utilities Commission, even though privately owned public utilities are specifically covered (R. 106).

(i) Further, §6-2615, T.C.A., speaks of the utility district's records as "public records" (R. 107).

(j) Apart from the Utility District Act, §6-318, T.C.A., "Municipal Property and Services," §6-604, T.C.A., in the Municipal Corporations section, and §9-1202, T.C.A., dealing with revenue bond refinancing, refer to and/or characterize a utility district as a "municipality" (R. 36).

(k) Under several federal statutes, including 42 USC 418 (and its counterpart in the Tennessee Code, §8-3811), recognition is given to the fact that a utility district is a governmental entity; an arrangement is provided for voluntary coverage to provide social security benefits to District employees, rather than the mandatory coverage required of non-governmental entities; also interest earned on a utility district's bonds is claimed to be exempt from federal income tax (R. 35).

(l) The district is required to publish its annual statement in a newspaper of general circulation by §6-2617, T.C.A. (R. 108).

(m) The district not only has the power of eminent domain, but can exercise it even against other governmental entities (R. 104).

(n) The state legislature passed this Act to provide a municipal corporate arrangement to furnish certain required services, not feasibly done otherwise (R. 30, 50).

(o) Section 6-2612 of the Utility District Act is a general grant of power and vests in the district "*all the powers necessary and requisite—capable of being delegated by the legislature*" (Emphasis added) (R. 105).

(p) Section 6-2614, T.C.A., as amended, provides that in certain counties, the three commissioners be appointed until the first of the month following the next general election and, at that election, the commissioners be elected for terms of 2, 4, and 6 years by the qualified voters of the district (R. 125).

(q) Vacancies, other than those filled as above, are filled by a vote of the remaining commissioners. If they fail to agree, the fact is certified to the County Judge, who appoints the new commissioner (R. 106, 125). Thus, the district is administered, either by publicly elected officials, or by officials appointed by publicly elected officials of the county.

(r) The general ouster law of Tennessee available for ouster or removal of elected officials applies to the district's commissioners (R. 106; see notes after §6-2614, T.C.A.).

On page 4 of the petition the following are listed among the "undisputed" facts:

"The powers of the District are vested in and exercised by a three member board of commissioners, who are not subject to state or county regulation (Emphasis added). . . . Neither the state nor the county has any control over the District's employees, and they are not considered state or county employees." (Emphasis added).

It is submitted these statements, rather than being undisputed facts, are actually dubious and/or argumentative conclusions when considered in the light of all the truly undisputed facts, including (a) through (r) listed on pages 4 through 6.

Two other observations must be made about these so called "facts":

(a) In the opinion of the Court of Appeals below, reported at 427 F.2d 312, the following appears as footnote 2 on page 314:

"We disagree with the Board's ruling that because the State does not supervise the District or remove or discipline its commissioners or subordinates, therefore the District is not a political subdivision. We would think that the independence of the District strengthens rather than weakens the proposition that it is a political subdivision."

(b) Section 6-2613, T.C.A., specifically exempts a district from the regulation by the State Railroad and Public Utilities Commission required of a private utility. This is done because of a district's governmental nature.

What is significant about this is that the National Labor Relations Board has misunderstood the significance of this exemption throughout this entire proceeding.

It is submitted that both of the foregoing are typical examples of the Board's failure in this case to properly evaluate the "economic realities."

### R. The Decisions of the Board and the Court of Appeals.

In its brief on page 6, petitioner, in referring to the initial Board decision, states that despite the fact that the Supreme Court of Tennessee had characterized districts as "arms or instrumentalities" of the state,

"the Board examined all of the relevant factors and concluded that the District was 'an essentially private venture, with insufficient identity with or relationship to the State of Tennessee to support the conclusion that it is an exempt governmental employer under the act.'"

There is, however, that large number of relevant factors above set out which are in this record and which the Board apparently failed to consider.

Similarly, in reference to the court of appeals' action, on page 7 of its brief, the Board quotes only two paragraphs from the very end of the opinion below (the entire basis for contending a conflict exists arises because of this language). What petitioner does not do is recognize that the court of appeals below had, for several pages, approved the *Randolph* rule, but merely distinguished the facts here.

Accordingly, the following is also quoted from the opinion below reported at 427 F.2d 312 on page 313:

"Section 6-2607 of the Tennessee Code, under which the Utility District was organized, provided that a District is a 'municipality or public corporation in perpetuity under its corporate name and the same shall be in that name a body politic and corporate with power of perpetual succession, but without any power to levy or collect taxes.'

The Supreme Court of Tennessee construed this statute in *First Suburban Water Util. Dist. v. McCanless*, 177 Tenn. 128, 146 S.W.2d 948 (1941), and

held that a District organized under it was a municipal corporation and as such was an arm or instrumentality of the state.

The Board declined to follow the decision of Tennessee's highest court, relying instead on *NLRB v. Randolph Elec. Membership Corp.*, 343 F.2d 60 (4th Cir. 1965), which case involved private non-profit utility corporations organized under the laws of North Carolina, which were formed for the exclusive benefit of their own members, did not have the power of eminent domain, were not subject to substantial control or supervision, and did not exercise any portion of the sovereign power of the state. The Board reasoned:

"The Utility Districts are not created directly by the State. They are formed by petition of property owners upon a County Judge's determination of the feasibility thereof. Thus, the District is no more a direct creation of the State than such privately-owned public service companies as railroads, and motor carriers, which also require some form of governmental approval, such as a certificate of convenience and necessity." (App., p. 15 n. 7).

This reasoning is obviously fallacious because privately owned railroads and motor carriers, even though they may have certificates of convenience and necessity, are operated for profit of their owners, whereas the District is owned and operated by the state, and not for the profit of private individuals. The District, unlike railroads and trucking companies, is a public corporation and was not subject to regulation even by the State Public Utilities Commission, and was exempt from all state taxes.

Reliance by the Board on *Randolph* is misplaced. In *Randolph*, unlike our case, there was no holding by the state's highest court that the private utilities were political subdivisions of the state.

In *Randolph* the private utilities were 'formed for the exclusive benefit of its own members.' Here, the District was formed for the benefit of the inhabitants of the community.

In *Randolph*, the utilities involved did not have the power of eminent domain. Here, the District not only has the power of eminent domain but also can exercise it over other governmental entities.

The Commissioners of the District further have the power to subpoena witnesses and to administer oaths. The District's records are 'public records.' The District is required to publish its annual statement in a newspaper of general circulation. Income from its bonds is claimed to be exempt from federal income taxes. Social Security benefits for its employees are voluntary instead of mandatory as the District is considered 'a political subdivision' under 42 U.S.C. §418(5).

In our opinion, it was not necessary that the District be created directly by the state in order to constitute a political subdivision. It is sufficient if the District be created in conformity with state law.

It should be noted that the Act does not require agencies of either federal or state governments to be created directly. As a matter of fact, wholly owned government corporations, including the Federal Reserve Bank and even non-profit hospitals, are specifically exempt.

Under Tennessee law the District is created by petition to the county judge, an elected official, who must find a public convenience and necessity therefor. The county judge appoints the first three commissioners nominated in the petition seeking formation of the District, and fills vacancies in the event the commissioners cannot agree among themselves. In counties having a population of 482,000 or more the commissioners of the Districts are elected at regular

general elections. Although the District involved in the present case did not have the requisite number of residents to necessitate the election of its commissioners, this factor indicates that Tennessee considers the functions of a District to be that of a 'political subdivision' requiring election of commissioners by the electors when the District encompasses a specified population."

Another ground for the decision herein by the Court of Appeals for the Sixth Circuit was that the Board had not here even followed its own prior decisions 427 F.2d 312, 314. *Mobile Steamship Authority, etc.*, 8 NLRB 1297 (1938); *Oxnard Harbor District*, 34 NLRB 1285 (1941); *New Jersey Turnpike Authority*, 33 LRRM 1528 (1954); *New Bedford Wood's Hole, Martha's Vineyard, etc., Steamship Authority*, 127 NLRB 1322 (1960).

Accordingly, it is submitted, petitioner in its brief, as it has done since its earliest decision in this matter, has failed to consider all the facts in the record.

Petitioner has also failed to adequately set forth and explain the opinion below of the Court of Appeals for the Sixth Circuit.

### III.

#### **ANSWER TO "REASONS FOR GRANTING THE WRIT"**

The decision of the Court of Appeals below is not in conflict with the decision of the Court of Appeals for the Fourth Circuit in *National Labor Relations Board v. Randolph Electric Membership Corporation*, 343 F.2d 60.

The two decisions do not involve "the same matter." (Rule 19(1) (b) of this Court)

First, the two decisions deal with different entities.

Second, the Court of Appeals' decision below, when considered as a whole, actually followed the *Randolph* case, set out many "economic realities" and based its decision on them, rather than merely blindly and unquestioningly following state law, as the petition infers.

At most, the sentence or two from the opinion below relied upon by petitioner as creating a conflict between this case and *Randolph* is merely an additional reason for the result reached herein.

There is also a third basis for the result reached herein, i.e., "Prior decisions of the Board do not support its holding here". 427 F.2d 312, 314. It is submitted this other reason for the decision below is merely another ground for concluding there is no conflict between the decision in this case and the decision in the *Randolph* case.

#### **A. The Randolph Case and the Case at Bar Deal with Different Entities.**

The *Randolph* case dealt with electric membership corporations while the case at bar deals with utility districts. Even a cursory comparison of a North Carolina electric membership corporation with a Tennessee Utility District reveals a different entity.

Coincidentally, the Tennessee statutes also provide for the organization of electric membership corporations in T.C.A. §65-2401 et seq. They are, when formed, very similar to those in the *Randolph* case, being essentially non-profit cooperatives and otherwise similar to privately owned public utilities. The National Labor Relations Board has itself ruled on such a Tennessee electric membership corporation. *NLRB v. Gibson County Electric Membership Corp.*, 65 NLRB 760 (1946). (This case was also cited in the *Randolph* case.)

In its brief, on page 8 thereof, petitioner states that the electric membership corporation considered in *Randolph* was created pursuant to a state statute similar to the Tennessee statute (T.C.A. §6-2601, §6-2636) creating the utility districts. It is submitted, there is little resemblance between these two statutes. The North Carolina statute considered in *Randolph* is, however, quite similar to §65-2401, T.C.A., which provides for electric membership cooperatives in Tennessee.

A comparison of the North Carolina Electric Membership Corporation Act, involved in the *Randolph* case, with the act creating the utility districts in Tennessee, involved in the case at bar, reveals significant differences between the two:

(a) Under the Tennessee Utility District Act, the district may furnish one or more types of service (including fire, police, garbage collection, etc.) to all persons in the district and has an exclusive franchise for same in the designated area.

Sections 117-15 and 117-16 of the General Statutes of North Carolina make it clear that only members are entitled to get electric power from the North Carolina Electric Membership Corporation.

Section 117-16 provides as follows:

"The corporate purpose of each corporation formed hereunder shall be to render service to its members only . . . ."

Tennessee utility districts, being political subdivisions of the state, must render service to all persons in the district.

The North Carolina electric membership corporations, not being governmental in nature, are required by statute

to render services *only* to their members, and other members of the public are not entitled to get service from it and, in fact, are prohibited from getting service from it.

The case of *Bailey v. Carolina Power Company*, 212 N.C. 768, 195 S.E. 64 (1938), held that persons, not members of the electric membership corporation involved in the case, could not maintain an action challenging the validity of the acts of the director of the corporation and, that, the fact that a person is a member of the community, or a resident of the territory, in which an electric membership corporation is authorized to operate, or might be eligible for membership therein, does not entitle him to service by such corporation.

Thus, an electric membership corporation exists solely for the benefit of its members; a Tennessee utility district exists to provide governmental services to citizens in certain areas and is similar to a county or municipality. Further, among the type of services that may be rendered by a utility district are such traditionally governmental services as fire, police, street lighting, garbage collection, etc.

(b) The Tennessee Utility District Act provides that the district not only has the power of eminent domain, but can exercise it even against other governmental entities (R. 104). On the other hand, §117-18(6) of the General Statutes of North Carolina provides that:

"Subject only to the constitution of the state, a corporation created under the provisions of this article shall have power to - - - apply to the North Carolina Rural Electrification Authority for permission to construct or place any parts of its system or lines in and along any state highway or over any lands which are now, or may be, the property of this state, or any political subdivision thereof. In all questions involving the right of way, or the right of eminent domain, the rul-

ings of the North Carolina Electrification Authority shall be final." (Emphasis added).

Thus, the North Carolina electric membership corporations specifically do *not* have the power of eminent domain, while the Tennessee public utility districts not only have this power, but have it against other governmental bodies.

The Board itself in the *New Jersey Turnpike Authority* case, *supra*, has held the presence of this power (eminent domain) to be a determinative factor in determining an entity to be a governmental subdivision.

(c) Section 6-2607, T.C.A., provides that, once formed, a Tennessee utility district shall be the only public corporation empowered to perform its services within its district. On the other hand, it was held in the case of *Pitt and Greene Electric Membership Corporation v. Carolina Power and Light Co.*, 255 N.C. 258, 120 S.E.2d 749 (1961), that an electric membership corporation and a privately owned public utility corporation are free to compete in rural areas, unless restricted by contract.

(d) Section 117-13 of the North Carolina Act provides that each corporation shall have a Board of Directors to be elected annually by the members, and the powers of the corporation shall be vested in said Board. This procedure resembles the stockholders and the directors of a private corporation and is to be contrasted with that followed to select the commissioners of the Tennessee utility district. Said commissioners are appointed by the county judge, the top elected official in most counties, and, in certain counties, it is provided, said utility district commissioners are elected in general elections.

Also of great significance is that profits (similar to dividends) inure to the exclusive benefit solely of the mem-

bers (similar to stockholders) of the Electric Membership Corporation; while the District under §6-2626, T.C.A. (R. 112) may only charge such rates as to remain self supporting, and all users in the entire area are affected by rate changes (the same as rates charged by a county and/or a municipality for governmental services affect all users in the county and/or municipality).

(e) In respondent's answer to the statement of the case, respondent has set out herein, at pages 4 through 6, certain other factors which lead to the conclusion that the utility district is a political subdivision. None of these factors are provided for under the Electric Membership Corporation Act of North Carolina.

Thus, respondent contends that there is no conflict in the two decisions; one holds that an electric membership corporation is not a "political subdivision", and the other holds that a utility district is a "political subdivision."

**B. The Court of Appeals Below Followed the Randolph Case by Taking Into Account the Economic Realities.**

The Fourth Circuit Court in *Randolph* stated at 343 F.2d 62:

" . . . To the extent that it has taken into account economic realities as well as the statutory purposes, the Board's determination is entitled to great respect." (Emphasis supplied).

It is, of course, the undenied duty and authority of the National Labor Relations Board to make an initial determination of its own jurisdiction, and having done so, to act as it feels the situation demands.

It is, however, and has been throughout the course of these proceedings, respondent's position that the NLRB

has incorrectly decided it has jurisdiction, and, thereafter, has consistently refused to reconsider the question (R. 18, 19-26).

The *Randolph* case certainly does not stand for the proposition that once the Board has determined its own jurisdiction, the courts do not have the right to challenge it. This position is in conflict with basic horn book law. Jurisdiction can be raised at any time in a proceeding. In *Cardillo v. Liberty Mutual Company*, 339 U.S. 469, 473 (1947), it was stated:

"But in reviewing an administrative order, it is ordinarily preferable where the issue is raised and where the record permits an adjudication, for a federal court first to satisfy itself that the administrative agency or officer had jurisdiction over the matter in dispute."

It is respondent's position that the Board failed to correctly analyze the "economic realities" and/or evaluate the total picture, and, consequently, failed to correctly apply the "political subdivision" exemption of §2(2) of the National Labor Relations Act, which respondent asserts is clearly dictated in this case, and which the Board's regional office held applicable in Case No. 26-RC-2972, involving another Tennessee utility district with identical powers and created under the same Act (R. 68, 58 and 69).

Respondent contends that the Court of Appeals below followed the *Randolph* rule. Rather than holding that state law, rather than Federal law, governs, without considering other factors, that court took into account both the "economic realities and the statutory purposes." Thus, the Court below followed the rule of the *Randolph* case but distinguished the facts here.

The actual holding of the *Randolph* case with reference to the effect of state law in interpretation of the Wagner Act is as follows:

"The fact that North Carolina sees fit to characterize such corporations as 'political subdivisions' . . . is not decisive of the question before us, since their relation to the state and their actual methods of operation do not fit the label given them" (Emphasis supplied).

The Court of Appeals below held, as far as utility districts are concerned, that their actual methods of operation and their relation to the state *do* fit the label that the state has given them.

In other words, the *Randolph* case held that where the actual methods of operation and the relation of the body *do not fit the label given them by the state*, *then* the fact that the state characterizes it as a "political subdivision" would not be decisive of the question.

At the end of its opinion herein, the Court of Appeals below did say:

" . . . the decision of the Supreme Court of Tennessee was of controlling importance on the question whether the District was a political subdivision of the state. In our opinion, it was binding on the Board."

Obviously, if the Court of Appeals below had only stated the foregoing and had not, before this, set out in detail the various economic realities on which it based its decision, there might be a conflict *if the same type* of entity were involved. But, having so set out at length the various economic realities, the last two sentences in the opinion are, at most, only another basis for the Court's decision.

Incidentally, still another ground for the result reached below is, as the Court of Appeals stated: "Prior decisions of the Board do not support its decision here", citing various Board decisions. In *Mobile Steamship Authority, etc.*, supra, *Oxnard Harbor District*, supra, and *New Jersey Turnpike Authority*, supra, the Board apparently held the

entities exempt without going into the question of whether state law is controlling in what constitutes a political subdivision. In *New Bedford, Wood's Hole, Martha's Vineyard, etc., Steamship Authority*, *supra*, the Board, citing *West v. American Telephone & Telegraph Co.*, 311 U.S. 223 (1940), held state law controlling on what constitutes a political subdivision. Thus, it is submitted, this further demonstrates there is no conflict between the result herein and *Randolph*, because the Court below, in part, rested its decision on the ground that the Board had not followed its own prior decisions.<sup>2</sup>

Most certainly, nowhere in *Randolph*, or in *NLRB v. Hearst Publications, Inc.*, 332 U.S. 102 (1944), cited by petitioner in its brief and relied upon by the Court in *Randolph*, is it stated that state law is not to be considered. All that the *Hearst* case said was that state law would not "exclusively" control. 322 U.S. 102 at page 125.

It is extremely important to note that *Randolph* chiefly relied upon *Hearst*.

Thus, the "conflict" boils down to the language, in the last two sentences of the full opinion below, where the Court stated that the decision of the Supreme Court of Tennessee that the District is a political subdivision is "binding on the Board" and the language in *Randolph*, from the *Hearst* case, that state law does not "exclusively" control. Is this a conflict in decisions on the same matter?

It is submitted that both courts followed the rule of first examining and evaluating all the underlying facts and economic realities in deciding that the entity is, or is not,

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2. To this should be added the Regional Director of Region 26 of the NLRB's ruling in Case No. 26-RC-2972 that the West Tennessee Public Utility District of Weakley, Carroll and Benton Counties, Tennessee was not an "employer" within the meaning of §2(2) of the Act (R. 58).

a political subdivision; the Court below, after so doing, held the respondent exempt. When this decision is considered as a whole, no real conflict exists, even if the same type of entity were involved—which, it is also submitted, as herein set out, is not the case.

The Court of Appeals below also followed *Randolph* and the case of *NLRB v. Hearst Publications*, *supra*, cited by petitioner in its brief, by looking to the intent of Congress in enacting the National Labor Relations Act. *Randolph* required "taking into account - - - the statutory purposes." The following language taken from the decision of the Court of Appeals below in the case at bar is pertinent:

"It was the clear intention of Congress not to make amenable to the National Labor Relations Act employees of either federal or state governments. The effect of the order of the Board in the present case may be to extend its jurisdiction over public employees, in nearly 270 Utility Districts in Tennessee, which Districts perform a wide variety of public functions."

## CONCLUSION

As stated above, petitioner's contention that there is a conflict of decisions in the courts of appeal is not valid.

Different entities were examined in the two decisions.

Further, in each case, the NLRB or a federal court of appeals, as the court below in this case and in *Randolph* did, must, in determining jurisdiction, consider the economic realities, including giving due consideration to state law, as well as the statutory purposes, in arriving at its decision as to whether an entity is, or is not, a "political subdivision." The particular facts and economic realities of each case must control.

The petition for a writ of certiorari should not be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 785

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE NATURAL GAS UTILITY DISTRICT OF  
HAWKINS COUNTY, TENNESSEE

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals (R. 149-155) is reported at 427 F. 2d 312. The Board's decision and direction of election in the representation proceeding (R. 61-66) are reported at 167 NLRB 691. Its decision and order in the ensuing unfair labor practice case (R. 138-145) are reported at 170 NLRB No. 156.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1970, and the Board's timely petition for rehearing *en banc* was denied on June 5, 1970 (R.

156-157). On August 29, 1970, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to, and including, October 1, 1970 (R. 158), and the petition was filed on that date; it was granted on January 11, 1971 (R. 158). The jurisdiction of the Court rests on 28 U.S.C. 1251(1).

#### **STATUTES INVOLVED**

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, *et seq.*), and of the Tennessee Code (Sess. 6-2601, *et seq.*), are set forth in the Appendix, *infra*, pp. 21-30.

#### **QUESTIONS PRESENTED**

1. Whether federal rather than state law governs the determination, under Section 2(2) of the National Labor Relations Act, whether an entity created under state law is a "political subdivision" of the state and therefore not an "employer" subject to the Act.
2. Whether the Board properly concluded that the respondent public utility district is not a political subdivision of the State of Tennessee, and whether, under the correct standard of judicial review, the court of appeals should have upheld that determination.

#### **STATEMENT**

##### **A. THE BOARD'S FINDINGS OF FACT**

On April 24, 1967, Local No. 102, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, filed a petition with the Board, pursuant to Section 9(e) of the National Labor Relations Act,

seeking to represent the pipefitters employed by the Natural Gas Utility District of Hawkins County, Tennessee. The District moved to dismiss the petition on the ground that it was a political subdivision of the State of Tennessee and thus not an employer within the meaning of Section 2(2) of the Act (R. 61; 6-7). The Board rejected this contention and directed that an election be held (R. 62-66). The Union won the election and was certified as the employees' representative (R. 69-70). Upon the District's subsequent refusal to recognize and bargain with the Union on the ground that it was not an employer under the Act, the Union filed an unfair labor practice charge which initiated the present case (R. 72-74). The facts with respect to the District's status as an employer under the Act are as follows:

The District sells and distributes natural gas, without profit, to residential homes, commercial businesses, and industrial firms in Hawkins County, Tennessee (R. 62; 11). It was incorporated in December 1957, under the Tennessee Utility District Law of 1937 (App., *infra*, pp. 21-30).<sup>1</sup> Pursuant to that law, a group of local real property holders in Hawkins County filed a petition with the County Court setting forth a statement of the need for the service to be supplied, an estimate of the cost, and the names of three local residents proposed as commissioners of the District (R. 64, n. 7; 56-58). Following a hearing, the Chairman of the County Court of Hawkins County

<sup>1</sup>There are about 270 similar utility districts in the state (R. 102).

approved creation of the District and granted the petition (R. 60-61). As required by the state statute (App., *infra*, p. 23), the County Judge appointed as commissioners of the newly created District the three people nominated in the petition (R. 64, n. 8; 61).<sup>2</sup>

The powers of the District are vested in and exercised by the three-member board of commissioners, who are not subject to state or county regulation (R. 12-14; App., *infra*, pp. 23-25). The commissioners adopt necessary rules or regulations, and set the fees charged for the District's services (R. 13; App., *infra*, pp. 27-28). They also control the labor relations policy of the District. The manager of the District, who is under the supervision of the board of commissioners, hires and fires its employees and sets their wages (R. 13-14). Neither the state nor the county has any control over the District's employees, and they are not considered state or county employees (R. 14, 155), whose labor conduct might be specially restricted as a matter of public policy.

No public money was utilized in organizing the District; it was financed through the private sale of bonds of nearly two million dollars (R. 130, 117-118). With the proceeds, the District constructed a natural gas distribution system (R. 130), which, under the statute, became subject to a lien in favor of the bond-

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<sup>2</sup> The Tennessee statute provides that, in counties having a population of 482,000 or more, commissioners of utility districts shall be elected by the qualified voters in the District (App., *infra*, pp. 25-26). This provision is inapplicable to Hawkins County.

holders until the bond debt was paid. (App., *infra*, pp. 28-29). Principal and interest on the bonds are payable solely from the revenues of the District (App., *infra*, pp. 29-30). Rates charged by the District must be sufficient to pay its expenses, plus the bond debt as it comes due (App., *infra*, p. 30).

The statute under which the District was organized provides that a utility district is a "municipality" or public corporation," and exempts it from "state, county and municipal taxation" (App., *infra*, pp. 23, 30). The Supreme Court of Tennessee has upheld this tax exemption on the ground that utility districts are "arms or instrumentalities" of the state (R. 62-63).<sup>3</sup> The statute further gives the District the power of eminent domain (App., *infra*, pp. 24-25), and empowers the board of commissioners to inquire into any matter relating to the affairs of the District and to issue subpoenas and administer oaths for this purpose (App., *infra*, p. 27). The District, however, has no power to levy or collect taxes and its charges for services are not construed to be taxes (R. 62, n. 2; App., *infra*, p. 23).

#### B. THE DECISIONS OF THE BOARD AND THE COURT OF APPEALS

In its initial decision in the representation proceeding (R. 61-66), the Board rejected the District's contention that it was a political subdivision of the State

<sup>3</sup>*First Suburban Water Utility District v. McCanless*, 177 Tenn. 128, 146 S.W. 2d 948, 950; this opinion did not concern itself in any respect with labor relations questions.

of Tennessee within the meaning of Section 2(2) of the National Labor Relations Act and thus not subject to the Act. The Board noted that the Tennessee statute specifically states that a utility district is a "municipality" or "public corporation" and that the Supreme Court of Tennessee had concluded that such districts are "arms or instrumentalities" of the state; but it held that such characterizations are not controlling in interpreting the National Labor Relations Act. Noting that the scope of the National Labor Relations Act is to be determined by federal standards and not by the varying declarations and classifications of state law (R. 63, n. 4), the Board examined the relevant factors and concluded that the District was "an essentially private venture, with insufficient identity with or relationship to the State of Tennessee to support the conclusion that it is an exempt governmental employer under the Act" (R. 63).

In the subsequent unfair labor practice proceeding, the Board relied on its earlier determination that the District was an "employer" covered by the Act (R. 140-141). Accordingly, the Board held that the District's refusal to bargain with the Union selected by its employees violated Section 8(a)(5) and (1) of the Act (R. 143). The Board ordered the District to cease and desist from the unfair labor practices found, to bargain with the Union upon request, and to post appropriate notices (R. 144-145).

A divided court of appeals declined to enforce the Board's order (R. 149-155), ruling that state law was controlling on the issue whether the District is a

"political subdivision" within the meaning of Section 2(2) of the Act. The court stated (R. 153-154):

In our opinion, the state has a right to create its own political subdivisions, and when its creations have been held by the state's highest court to constitute political subdivisions that ought to be binding on federal administrative agencies.

\* \* \* \*

\* \* \* In our judgment, the present case involves more of a question of *municipal law* than a *labor problem*, and the decision of the Supreme Court of Tennessee was of controlling importance on the question whether the District was a political subdivision of the state. In our opinion, it was binding on the Board. [Emphasis in the original.]

#### SUMMARY OF ARGUMENT

##### I

The court below erred in holding that a decision of the Supreme Court of Tennessee finding utility districts properly exempt from taxation under state law was controlling for purposes of determining whether such a district is a "political subdivision" of the state within the meaning of the exemption in Section 2(2) of the National Labor Relations Act. Nothing in the Act's history or purposes indicates it "is to be administered in accordance with whatever different state standard the respective states may see fit to adopt for the disposition of unrelated, local problems." *National Labor Relations Board v. Hearst Publications,*

322 U.S. 111, 123. Rather, the exemption is properly interpreted with a view toward the manner in which employment relations are carried on. To give controlling weight in the administration of federal labor law to mere characterization regarding what constitutes a "political subdivision" would produce a haphazard result, with no unifying policy or purpose. As this Court implicitly recognized in *Division 1287, Motor Coach Employees v. Missouri*, 374 U.S. 74, the uniform administration that Congress sought under the National Labor Relations Act can be attained only by having federal rather than state law determine the extent of the Section 2(2) exemption.

## II

Applying a uniform national standard, the Board reasonably determined that the District was not exempt from the Act as a political subdivision of the state under Section 2(2). The District is no more a direct creation of the State than privately-owned public service companies, which also require some form of governmental approval before they begin operations. It is completely autonomous in the conduct of its day-to-day affairs; the state has no power to remove or otherwise discipline the private individuals who control the District's operations and labor relations policies. The operations and services of the District "do not differ significantly from those of enterprises in private industry including utilities whose employees are entitled to the benefits of the Act" (R. 64). And its labor relations are entirely its own;

its employees are not state or county employees under local law. Weighing these factors in the context of all the other relevant considerations, the Board justifiably concluded that the District was not a "political subdivision" of the state. Whether or not the court below would have reached the same conclusion on its own *de novo* evaluation of the facts, it should have accepted the Board's considered judgment on this matter.

#### **ARGUMENT**

I. FEDERAL, RATHER THAN STATE, LAW GOVERNS THE DETERMINATION WHETHER AN ENTITY IS A "POLITICAL SUBDIVISION" OF A STATE WITHIN THE MEANING OF SECTION 2(2) OF THE NATIONAL LABOR RELATIONS ACT, AND THEREFORE NOT AN "EMPLOYER" SUBJECT TO THAT ACT

Section 2(2) of the National Labor Relations Act provides that the term "employer" shall not include "the United States or \* \* \* any State or political subdivision thereof" (App., *infra*, p. 21). The term "political subdivision" is not defined in the Act and the legislative history is silent as to the meaning Congress intended to give it.<sup>4</sup> As with other coverage

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<sup>4</sup> However, the evident purpose of the governmental exemption as a whole was to avoid interference with the labor-management relations of federal, state, and municipal governments and their employees, since the latter traditionally lacked the right to strike against the government. See Leg. Hist. of the National Labor Relations Act, 1935 (G.P.O., 1949) 1117, 2653; Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948) 1535. See also Rhyne, *Labor Unions and Municipal Employee Law* (National Institute Municipal Law Officers, 1946) 436-437; Vogel, *What About the Rights of the*

questions under the Act,<sup>5</sup> it is reasonable to conclude that Congress intended that the determination whether an entity is a "political subdivision" of a state for purposes of the National Labor Relations Act be made under federal law, formulated by the Board subject to review by the courts of appeals and this Court, rather than under state law.

As this Court pointed out long ago, *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111, 123:

Both the terms and the purposes of the statute, as well as the legislative history, show that Congress has in mind no \* \* \* patchwork plan for securing freedom of employees' organization and of collective bargaining. The [National Labor Relations] Act is federal legislation, ad-

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*Public Employee?* 1 Lab. L. J. 604, 612-615 (1950). The relationship between the exemption and anti-strike provisions of state law is implicit in the decisions of this Court striking down state efforts to extend such provisions to other groups of employees. *Division 1287, Motor Coach Employees v. Missouri*, 374 U.S. 74; *Amalgamated Bus Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383.

<sup>5</sup> See *Local No. 207, Int'l Assoc. of Bridge Workers Union v. Perko*, 373 U.S. 701 (whether an individual is a "supervisor" under Section 2(11)); *Marine Engineers Beneficial Assoc. v. Interlake Steamship Co.*, 370 U.S. 173 (whether an entity is a "labor organization" under Section 2(5)); *National Labor Relations Board v. United Insurance Co.*, 390 U.S. 254 (whether an individual is an "independent contractor" under Section 2(3)), *National Labor Relations Board v. E. C. Atkins & Co.*, 331 U.S. 398, and *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 331 U.S. 416 (whether "militarization" or "deputization" of plant guards employed by a private employer removes them from the status of "employees" under Section 2(3)).

ministered by a national agency, intended to solve a national problem on a national scale. \* \* \* Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by \* \* \* varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different state standard the respective states may see fit to adopt for the disposition of unrelated, local problems. \* \* \*

This objective would be substantially impaired if state characterization was to control the determination whether an entity is a political subdivision of a state for purpose of exemption from the National Labor Relations Act. Cf. *Morgan v. Commissioner*, 309 U.S. 78, 80-81.

In administering the Act on a national basis, the Board has limited the exemption for political subdivisions to entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate. *National Labor Relations Board v. Randolph Electric Membership Corp.*, 343 F. 2d 60, 63-64, n. 7 (C.A. 4).<sup>6</sup> This

<sup>6</sup> See *Mobile Steamship Assoc.*, 8 NLRB 1297, 1305, 1318 (state docks commission created by specific legislation of the State of Alabama); *Oxnard Harbor District*, 34 NLRB 1285, 1289-1290 (harbor district organized by district residents under general enabling legislation of the State of California, but governed by a board of commissioners elected by qualified voters of district); *New Jersey Turnpike Authority*, 33 LRRM 1528 (turnpike authority specifically created by the legislature and governed by members appointed by the governor, with the advice and consent of the senate); *New Bedford etc. Steamship*

test provides a reasonable and uniform standard for differentiating between essentially private employment relations and those controlled by the state or its components to such an extent that they are properly exempted from statutory coverage.

What that extent might be was also suggested by the decision of this Court in *Division 1287, Motor Coach Employees v. Missouri*, 374 U.S. 74, 81, in considering a claim that a state's seizure of a public utility had operated to make the state an "employer" within the meaning of the exclusion. Applying a standard implicitly federal, the Court held that

the State's involvement fell far short of creating a state-owned and operated utility whose labor relations are by definition excluded from the coverage of the National Labor Relations Act. The employees of the company did not become employees of Missouri. Missouri did not pay their wages and did not direct or supervise their duties. No property of the company was actually conveyed, transferred, or otherwise turned over to the State. Missouri did not participate in any way in the actual management

*Authority*, 127 NLRB 1322 (steamship authority created by Massachusetts statute, consisting of members appointed and removed by the governor with the advice and consent of the executive council); *Fayetteville-Lincoln Electric System*, 183 NLRB No. 19, 74 LRRM 1278 (utility system created by specific legislation and governed by board appointed by mayor, with the approval of city aldermen). Cf. *Lewiston Orchards Irrigation District*, 186 NLRB No. 121, 75 LRRM 1430 (irrigation district created by petition of landowners and governed by directors elected by landowners for their benefit, rather than by all qualified voters in a general election).

of the company, and there was no change of any kind in the conduct of the company's business \* \* \*

Compare, also, *United States v. United Mine Workers*, 330 U.S. 258, 284-283, where a contrary set of facts led to the conclusion that miners in coal mines seized under the War Labor Disputes Act were federal employees. Where the state does not directly control the terms and conditions of employment, as it does not here, this Court has not found a state employment relationship permitting denial of the right to organize and to strike.<sup>7</sup> *Division 1287, supra*; see also *National Labor Relations Board v. E. C. Atkins & Co.*, 331 U.S. 398; *National Labor Relations Board v. Howard Johnson Co.*, 317 F. 2d 1 (C.A. 3), certiorari denied, 375 U.S. 920.

Although a state has a vital interest in defining its political subdivisions and a special competence to do so, the considerations that may prompt a state to label an entity a political subdivision are varied and have no necessary relation to the purposes for which an exemption from the National Labor Relations Act is afforded. Thus, an entity created and operated by

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<sup>7</sup> In the Tennessee cases imposing restraints on freedom of employee organization and collective bargaining, it was specifically found that the employees in question were county or municipal employees. *Weakley County Municipal Elec. Sys. v. Vick*, 43 Tenn. App. 524, 309 S.W. 2d 792, 796; *City of Alcoa v. International Bhd. of Electrical Workers*, 203 Tenn. 12, 308 S.W. 2d 476; *Keeble v. City of Alcoa*, 204 Tenn. 286, 319 S.W. 2d 249. In the *Weakley County* case, *supra*, the court noted that employees of utility districts under the state legislation here were not city or county employees in that sense. 309 S.W. 2d at 805.

private individuals who are free from state control in fixing terms and conditions of employment may nonetheless be denominated a "political subdivision" for particular state purposes that have nothing to do with its "relation to the state and [its] actual methods of operation."<sup>8</sup> *National Labor Relations Board v. Randolph Electric*, *supra*, 343 F.2d at 64. Another state, or the same state for other purposes, may determine that a similar entity, equally uncontrolled, is not a "political subdivision"—again, for reasons unrelated to the factors that are significant under the National Labor Relations Act.<sup>9</sup> What must be con-

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<sup>8</sup> For example, in upholding the exemption of utility districts from taxation under state law as "municipalities" or "arms of the State," the Tennessee Supreme Court, in the decision relied on by the court below (R. 150), stated: "It is elementary that the Legislature may call such bodies what it pleases, and may give and take away as it chooses their powers and privileges." *First Suburban Water Utility District v. McCanless*, 177 Tenn. 128, 146 S.W. 948, 950. Similarly, in *Madison Suburban Utility District of Davidson County v. Carson*, 191 Tenn. 300, 232 S.W. 2d 277, 279, the Tennessee Supreme Court upheld the exemption of utility districts from state use and sales taxes, even though it recognized that:

"The appellant [utility district] does not have the power to levy taxes nor is it listed as a municipality under the Federal census and its population is never separately tabulated. The people residing within the district do not have the right of self-government. The district performs no governmental function except carrying on the business as a water and sewage company with all those powers necessarily connected therewith."

<sup>9</sup> See McQuillin, *Municipal Corporations*, Secs. 2.26-2.29 (Cal laghan & Co., 3rd ed., 1949), for the varying approaches that may be taken under state law with respect to "municipal" or "quasi-public" corporations. See also *Lewiston Orchards Irrigation District v. Gilmore*, 53 Ida. 377, 23 P. 2d 720, 722; In

trolling is the manner in which the entity's labor relations are carried on. To give conclusive weight in the administration of federal labor law to state law characterizations would at the least invite a patchwork of policies, with no coherent sense or purpose, and might encourage measures such as this Court found preempted in *Amalgamated Bus Employees and Division 1287, supra*, n. 4.

Accordingly, while a state's characterization of a utility district or other entity as a political subdivision is a factor to be considered in determining whether it falls under the "political subdivision" exclusion of the National Labor Relations Act, that characterization cannot be conclusive. As the Fourth Circuit correctly concluded in *National Labor Relations Board v. Randolph Electric, supra*, 343 F. 2d at 63, the uniformity which Congress meant to secure in the administration of the National Labor Relations Act can be attained only by having federal, rather than state, law control determination of that question.<sup>10</sup> The court below thus erred in holding that the "decision of the Supreme Court of Tennessee was of controlling im-

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*re Walker River Irrigation District*, 44 Nev. 321, 195 P. 327, 331-332. Cf. *Local 266, Electrical Workers v. Salt River Project Agricultural Improvement District*, 78 Ariz. 30, 275 P. 2d 393.

<sup>10</sup> In urging that federal rather than state law determines whether utility districts are a political subdivision of the state under the National Labor Relations Act, we of course raise no question as to the propriety of such characterization for state law purposes. Nor do we here take any position on whether these districts are or are not political subdivisions under other federal legislation.

portance on the question whether the District was a political subdivision of the state", and was "binding on the Board" (R. 154).

## II. THE BOARD CORRECTLY CONCLUDED THAT THE DISTRICT IS AN EMPLOYER WITHIN THE MEANING OF THE ACT

As shown above, pp. 3-5, the District was created, pursuant to general enabling legislation, upon a petition of local property owners which was approved by a County Judge. As the statute required, the County Judge appointed as commissioners of the District the three private persons nominated in the petition.<sup>11</sup> Thus, as the Board concluded, "the District is no more a direct creation of the State than such privately-owned public service companies as railroads, and motor carriers, which also require some form of governmental approval, such as a certificate of convenience and necessity" (R. 64, n. 7).<sup>12</sup> Nor is

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<sup>11</sup> The County Judge may name a commissioner to the board only if a vacancy occurs and the two remaining commissioners are unable to agree on a third (App., *infra*, p. 25).

<sup>12</sup> The court below viewed this reasoning as "fallacious" because such public service companies "are operated for profit of their owners, whereas the District is owned and operated by the state, and not for the profit of private individuals" (R. 151). In fact, however, the utility system operated by the District is not state property, but is owned by the District itself, subject to a statutory lien in favor of the private bondholders, and such other encumbrances as the board of commissioners may see fit to make (App., *infra*, pp. 24, 27, 28-29). The fact that the District is not operated for profit (R. 62) does not exempt it from the Act. *Office Employees International Union v. National Labor Relations Board*, 353 U.S. 313, 318-319; *Cornell University*, 183 NLRB No. 41, 74 LRRM 1269 (June 12, 1970).

Nor is there merit to the lower court's suggestion that the utility district here is significantly different from the electric

it "administered by State-appointed or elected officials" (R. 64).

Moreover, the Board found, the District "is completely autonomous in the conduct of its day-to-day affairs, with the State exercising no supervisory role with respect thereto, or reserving any power to remove or otherwise discipline those responsible for the [District's] operations" (R. 64). The record fully supports this finding. As the dissenting judge below pointed out (R. 155) :

The District's manager testified unequivocally that it is governed by the board of commissioners which adopts rules and regulations necessary to its operation; that the board sets all service rates; that the manager, and ultimately the board, hires and fires employees and determines wages; that neither the employees nor the District is controlled in any way by the county or state government.

The Board could reasonably conclude that these factors, plus the further fact that the District's

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membership cooperative involved in *Randolph Electric*, *supra*, because the District was formed for the benefit of the inhabitants of the community while the cooperative was formed for the exclusive benefit of its members (R. 151). Both entities were formed by private individuals for the benefit of themselves and their communities. Membership in the *Randolph* cooperative was available, without arbitrary or unreasonable limitations, to all applicants. 343 F. 2d at 63. Conversely, under Tennessee law, the inhabitants of a utility district have no absolute right to demand an extension of the service to their location. See *Chandler Investment Co. v. Whitehaven Utility District*, 44 Tenn. App. 1, 311 S.W. 2d 603, 611.

"operations and services do not differ significantly from those of enterprises in private industry including utilities whose employees are entitled to the benefits of the Act" (R. 64), outweighed such countervailing factors as the pronouncements of the State on the District's status as a "municipality" or "instrumentality" of the State, and its grant of power of eminent domain to the District.<sup>13</sup> See *City of Paris v. Federal Power Commission*, 399 F. 2d 983, 986 (C.A. D.C.). Of particular importance is the fact that District employees share neither the benefits nor the burdens of direct state or municipal employment. *Division 1287, supra; Weakley County, supra.*

In sum, the Board was warranted in holding that the District has an "insufficient identity with or relationship to the State of Tennessee to support the conclusion that it is an exempt governmental employer under the Act" (R. 63). Whether or not the court below would have reached the same conclusion on a *de novo* evaluation of the facts—and *Division 1287, supra*, suggests that it should have—there was ample support on review for the Board's considered judgment on this issue.<sup>14</sup> See *National Labor Relations Board*

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<sup>13</sup> With respect to the District's power of eminent domain, the Board stated: "[W]e think it significant that legislatures have frequently delegated such power to nonexempt privately-owned and operated service corporations. Indeed, the Tennessee Legislature itself has delegated such authority to private corporations." (R. 64-65, and authorities there cited at nn. 9 and 10.)

<sup>14</sup> The Board also considered the other factors urged by the District in support of its claimed exemption—*e.g.*, the power of the commissioners to inquire into the District's affairs and to

v. *United Insurance Co.*, 390 U.S. 254, 260; *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111, 130-131; *National Labor Relations Board v. E.C. Atkins & Co.*, 331 U.S. 398, 403-404, 412-415. The court of appeals therefore, should have upheld the Board's determination that the District is an employer under the Act.

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subpoena witnesses and administer oaths for that purpose, the requirement that the District publish its annual statement in a newspaper of general circulation, and the District's asserted special status under federal tax laws (R. 151). The Board's decision reflects its judgment that these factors, too, were outweighed by those supporting coverage. Nor was the Board's decision here inconsistent with its prior holdings. The language in the *New Bedford* decision, *supra*, 127 NLRB at 1324-1325, that state law is controlling on the scope of the Section 2(2) exemption, was not necessary to the result reached there, and was rejected by the Board in subsequent decisions such as *Randolph Electric*, and the present case. See *National Labor Relations Board v. Randolph Electric*, *supra*, 343 F. 2d at 63, n. 6.

Similarly, the decision that the utility district of Weakley, Carroll and Benton Counties, Tennessee was within the Section 2(2) exemption, Case No. 26-RC-2972 (R. 110-112), was made by the Board's Regional Director and was never reviewed by the Board itself. The decision here, which was made by the Board itself, postdates that decision (R. 140, n. 3).

**CONCLUSION**

The judgment of the court of appeals should be reversed, and the case should be remanded to that court with directions to enforce the Board's order.

Respectfully submitted.

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**FEBRUARY 1971.**

## APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

### Section 2. When used in this Act—

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof \* \* \*.

\* \* \* \* \*

### Section 8(a). It shall be an unfair labor practice for an employer—

\* \* \* \* \*

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

The relevant provisions of the Tennessee Utility District Act of 1937, as amended (Tennessee Code, Title 6, Chapter 26, Secs. 6-2601, *et seq.*), are as follows:

**6-2602. Petition for creation.**—A petition for the incorporation of a utility district may be submitted to the county judge or chairman of the county court of any county in which the proposed district is situated, said petition to be signed by not less than twenty-five (25) owners of real property, who shall also reside within the boundaries of the proposed district. Said petition shall include (a) a statement of the necessity for the service or services to be supplied by the proposed district; (b) the proposed corporate name and boundaries of the district; (c) an estimate of the cost of the acquisition

or construction of the facilities of the district (which estimate shall not, however, serve as a limitation upon the financing of improvements, or extensions of the facilities), and (d) the nomination of three (3) residents of the district for appointment as commissioners of the district. The petition shall be signed in person by the petitioners with the addresses of their residences and shall be accompanied by a sworn statement of the person or persons circulating the petition, who shall state under oath that he or they witnessed the signature of each petitioner, that each signature is the signature of the person it purports to be, and that to the best of his or their knowledge each petitioner was, at the time of signing, an owner of real property within and a resident of the proposed district.

\* \* \* \* \*

*6-2604. Hearing and order of approval.*—Upon receipt of such petition it shall be the duty of the county judge or chairman of the county court to fix a time and place for a public hearing upon the convenience and necessity of the incorporation of the district. The date of such hearing shall be not more than thirty (30) days after the receipt of the petition and its date, place and purpose shall be announced by the county judge or chairman of the county court in a notice published not more than fifteen (15) days nor less than seven (7) days prior to the date of the hearing in a newspaper of general circulation in the proposed district, or if there be no such newspaper, then by posting such notice in five (5) conspicuous public places within the boundaries of the proposed district. If at said public hearing the county judge or chairman of the county court finds (a) that the public convenience and necessity requires the creation of the district, and (b) that the creation of the district is economi-

cally sound and desirable, he shall enter an order of the court so finding, approving the creation of the district, designating it as "the \_\_\_\_\_ Utility District of \_\_\_\_\_ County, Tennessee," defining its territorial limits and appointing as commissioners of the district those persons nominated in the petition, of whom one (1) shall be appointed for a term of two (2) years, one (1) for a term of three (3) years, and one (1) for a term of four (4) years. Such order shall be filed with the clerk of the court and entered on record. \* \* \*

\* \* \* \* \*

*6-2607. District as municipality—Powers.*—From and after the date of the making and filing of such order of incorporation, the district so incorporated shall be a "municipality" or public corporation in perpetuity under its corporate name and the same shall in that name be a body politic and corporate with power of perpetual succession, but without any power to levy or collect taxes. Charges for services authorized herein, shall not be construed as taxes. The powers of each district shall be vested in and exercised by a majority of the members of the board of commissioners of the district. So long as the district continues to furnish any of the services which it is herein authorized to furnish, it shall be the sole public corporation empowered to furnish such services in the district and no other person, firm or corporation shall furnish or attempt to furnish any of the said services in the area embraced by the district, unless and until it shall have been established that the public convenience and necessity requires other or additional services; \* \* \*

\* \* \* \* \*

*6-2610. Powers in carrying out purposes.*—Any district created pursuant to this chapter shall have the power;

- (a) To sue and be sued.
- (b) To have a seal.
- (c) To acquire by purchase, gift, devise, lease or exercise of the power of eminent domain or other mode of acquisition, hold and dispose of real and personal property of every kind within or without the district, whether or not subject to mortgage or any other liens.
- (d) To make and enter into contracts, conveyances, mortgages, deeds of trust, bonds or leases.
- (e) To incur debts, to borrow money, to issue negotiable bonds and to provide for the rights of holders thereof.
- (f) To fix, maintain, collect and revise rates and charges for any service.
- (g) To pledge all or any part of its revenues.
- (h) To make such covenants in connection with the issuance of bonds, or to secure the payment of bonds, that a private business corporation can make under the general laws of the state, notwithstanding that such covenants may operate as limitations on the exercise of any power granted by this chapter.
- (i) To use any right-of-way, easement or other similar property right necessary or convenient in connection with the acquisition improvement, operation or maintenance of a utility, held by the state or any political subdivision thereof, provided that the governing body of such political subdivision shall consent to such use.

**6-2611. Eminent domain.**—Any district shall have power to condemn either the fee or such right, title interest, or easement in the property as the board may deem necessary for any of the purposes mentioned in this chapter, and such property or interest in such property may be so acquired whether or not the same is owned or held for public use by corporations, associations or persons having the power of eminent domain,

or otherwise held or used for public purposes; provided, however, such prior public use will not be interfered with by this use. \* \* \*

\* \* \* \* \*

**6-2613. Exemption from state regulation.**—Neither the railroad and public utilities commission nor any other board or commission of like character hereafter created shall have jurisdiction over the district in the management and control of any system, including the regulation of its rates, fees, tolls or charges.

**6-2614. Terms of commissioners—Vacancies.**—The terms of office of the members of the board of commissioners first appointed shall be two (2), three (3) and four (4) years respectively from date of appointment and thereafter the term of office of the members shall be four (4) years. Members shall hold office until their successors are elected and qualify. Any vacancy shall be filled and new commissioners shall be elected or old commissioners shall be reelected upon the expiration of any term of office by vote of the other commissioners then in office. In the event the two (2) commissioners cannot agree upon a new commissioner to fill any vacancy, they shall certify that fact to the county judge or chairman of the county court within thirty (30) days of the date upon which such vacancy occurs, and, thereupon, within ten (10) days the county judge or chairman of the county court shall appoint a third commissioner to fill such vacancy. Provided, however, that in counties having a population of 482,000 or more according to the federal census of 1950 or any subsequent federal census the three (3) commissioners shall be appointed for terms to run until the first of the month following the next regular general county election and at the next regular general county election one (1) shall be elected by the qualified voters living within the boundaries of the district for a term

of two (2) years, one for a term of four (4) years and one or a term of six (6) years. After that, there shall be elected at the regular general election held in the county each two (2) years, a commissioner for a full term of six (6) years. All qualified voters living in the boundaries of the utility district shall be eligible to vote for such commissioners. Candidates for office as commissioner shall qualify with the county election commission at least forty-five (45) days before the date of the election, provided, further, that all utility districts in existence in any such county on March 20, 1959 shall proceed to elect their commissioners in the same manner as above provided for new utility districts.

*6-2615. Compensation of commissioners—Delegation of powers—Officers—Records—Qualifications.*—The members of the board, except as provided in the next paragraph, shall serve without compensation for their services, but shall be entitled to reimbursement for all expenses incurred in connection with the performance of their duties. The board may delegate to one (1) or more of its members or to its agents and employees such powers and duties as it may deem proper, but at its first meeting and at the first meeting of each calendar year thereafter it shall elect one (1) of its members to serve as president, and another of its members as secretary of the commission. The secretary shall keep a record of all proceedings of the commission which shall be available for inspection as other public records, and shall be custodian of all official records of the district. Only persons resident in the district shall be eligible for election to the board.

Except as to counties having a population of not less than 41,000 nor more than 41,600 according to the federal decennial census of 1960 or any subsequent federal census, and except as to any utility district containing less than five

counties, the members of the board of commissioners shall be entitled to receive compensation for their services in an amount not to exceed twenty-five dollars (\$25.00) per day for each day's attendance of the meetings of said board in the performance of their official duties. The amount of compensation shall be fixed by the board of commissioners but the same shall not exceed the sum of twenty-five dollars (\$25.00) per day. Provided, however, that no member of a board of commissioners shall draw compensation in excess of three hundred dollars (\$300) for such services during any one calendar year.

**6-2616. Powers of commissioners.**—The board of commissioners of any district shall have power and authority;

(1) To exercise by vote, ordinance or resolution all of the general and specific powers of the district.

(2) To make all needful rules, regulations and by-laws for the management and the conduct of the affairs of the district and of the board.

(3) To adopt a seal for the district, prescribe the style thereof, and alter the same at pleasure.

(4) To lease, purchase, sell, convey and mortgage the property of the district and to execute all instruments, contracts, mortgages, deeds or bonds on behalf of the district in such manner as the board shall direct.

(5) To inquire into any matter relating to the affairs of the district, to compel by subpoena the attendance of witnesses and the production of books and papers material to any such inquiry, to administer oaths to witnesses and to examine such witnesses.

(6) To appoint and fix the salaries and duties of such officers, experts, agents and employees as it deems necessary, to hold office during the pleasure of the board and upon such terms and conditions as the board may require.

(7) To do all things necessary or convenient to carry out its functions.

**6-2617. *Publication of annual statement.***—Within ninety (90) days after the close of the fiscal year of each district organized and operating under the provisions of this law, the commissioners of the district shall publish in a newspaper of general circulation, published in the county in which the district is situated, a statement showing (a) the financial condition of the district at the end of the fiscal year; (b) the earnings of the district during the fiscal year just ended; (c) a statement of the water rates then being charged by the district, and a brief statement of the method used in arriving at such rates.

\* \* \* \* \*

**6-2619. *Purposes for which bonds authorized.***—Each district shall have power and is hereby authorized from time to time to issue its negotiable bonds in anticipation of the collection of revenues for the purpose of constructing, acquiring, reconstructing, improving, bettering or extending any facility or system authorized by this chapter, or any combination thereof, and to pledge to the payment of the interest and principal of such bonds all or any part of the revenues derived from the operation of such facility, system, or combination thereof. There may be included in the costs for which bonds are to be issued, reasonable allowances for legal, engineering and fiscal services, interest during construction and for six (6) months after the estimated date of completion of construction, and other preliminary expenses, including the expenses of incorporation of the district.

\* \* \* \* \*

**6-2623. *Remedies of bondholders.***—There shall be and there is created a statutory lien

in the nature of a mortgage lien upon any system or systems acquired or constructed in accordance with this chapter, including all extensions and improvements thereto or combinations thereof subsequently made, which lien shall be in favor of the holder or holders of any bonds issued pursuant to this chapter and all such property shall remain subject to such statutory lien until the payment in full of the principal of and interest on said bonds. Any holder of said bonds or any of the coupons representing interest thereon may either at law or in equity, by suit, action, mandamus, or other proceeding, in any court of competent jurisdiction, protect and enforce such statutory lien and compel performance of all duties required by this chapter, including the making and collection of sufficient rates for the service or services, the proper accounting therefor, and the performance of any duties required by covenants with the holders of any bonds issued in accordance herewith.

If any default be made in the payment of the principal of or interest on such bonds, any court having jurisdiction of the action may appoint a receiver to administer said district, and said system or systems, with power to charge and collect rates sufficient to provide for the payment of all bonds and obligations outstanding against said system or systems and for the payment of operating expenses, and to apply the income and revenues thereof in conformity with the provisions of this chapter, and any covenants with bondholders.

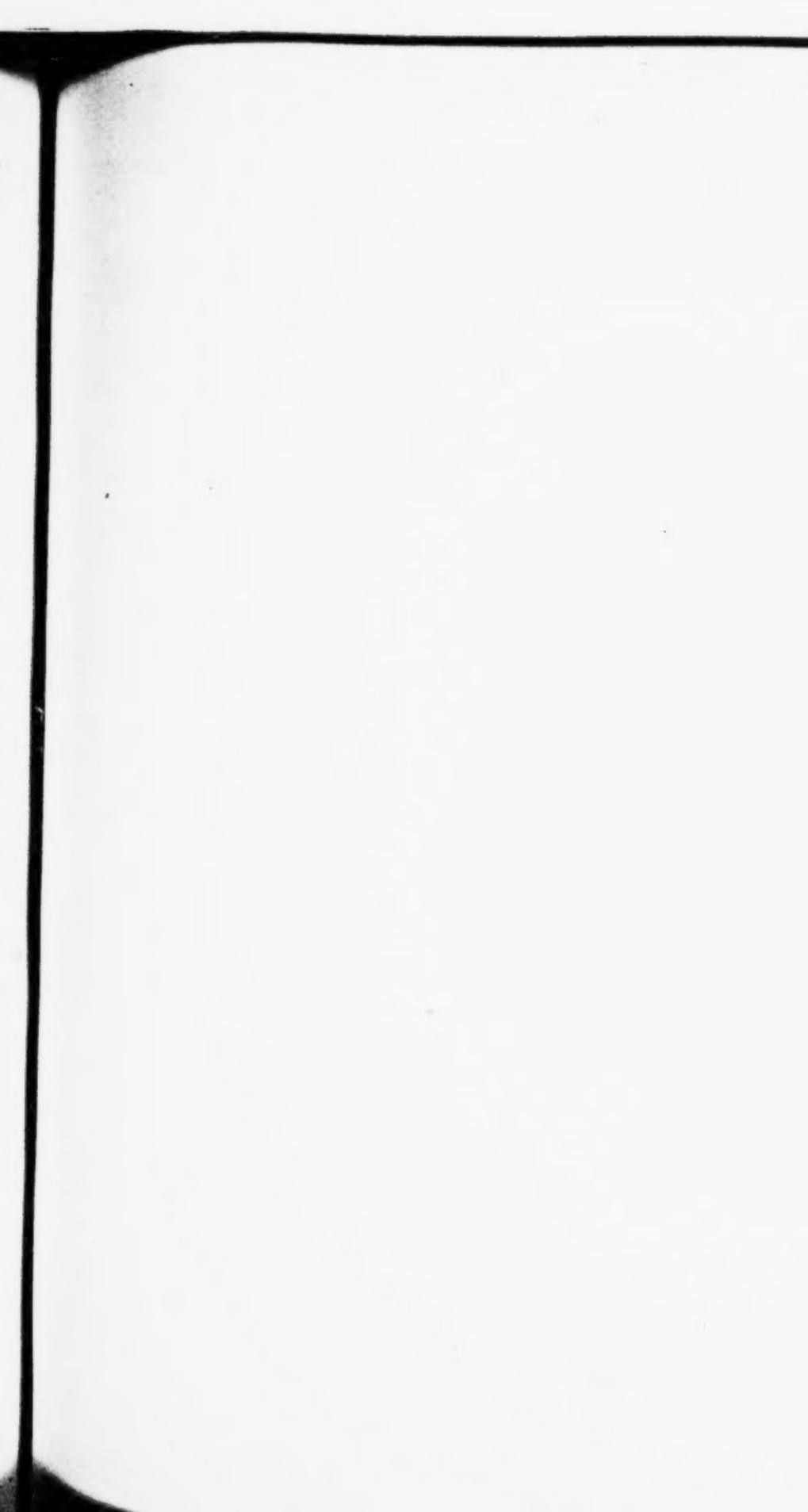
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6-2624. *Bonds payable from revenue.*—No holder or holders of any bonds issued pursuant to this chapter shall ever have the right to compel the levy of any tax to pay said bonds or the interest thereon. Each bond shall recite in substance that said bond and interest thereon

is payable solely from the revenue pledged to the payment thereof and that said bond does not constitute a debt of the district within the meaning of any statutory limitation.

**6-2625. *Rates sufficient to pay costs and retire bonds.***—The board of commissioners of any district issuing bonds pursuant to this chapter shall prescribe and collect reasonable rates, fees, tolls, or charges for the services, facilities, and commodities of its system or systems, shall prescribe penalties for the nonpayment thereof, and shall revise such rates, fees, tolls or charges from time to time whenever necessary to insure that such system or systems shall be and always remain self-supporting. The rates, fees, tolls or charges prescribed shall be such as will always produce revenue at least sufficient (a) to provide for all expenses of operation and maintenance of the system or systems, including reserves therefor, and (b) to pay when due all bonds and interest thereon for the payment of which such revenues are or shall have been pledged, charged or otherwise encumbered, including reserves therefor.

**6-2626. *Exemption from taxation.***—So long as a district shall own any system, the property and revenue of such system shall be exempt from all state, county and municipal taxation. Bonds issued pursuant to this chapter and the income therefrom shall be exempt from all state, county and municipal taxation, except inheritance, transfer and estate taxes, and it shall be so stated on the face of said bonds.





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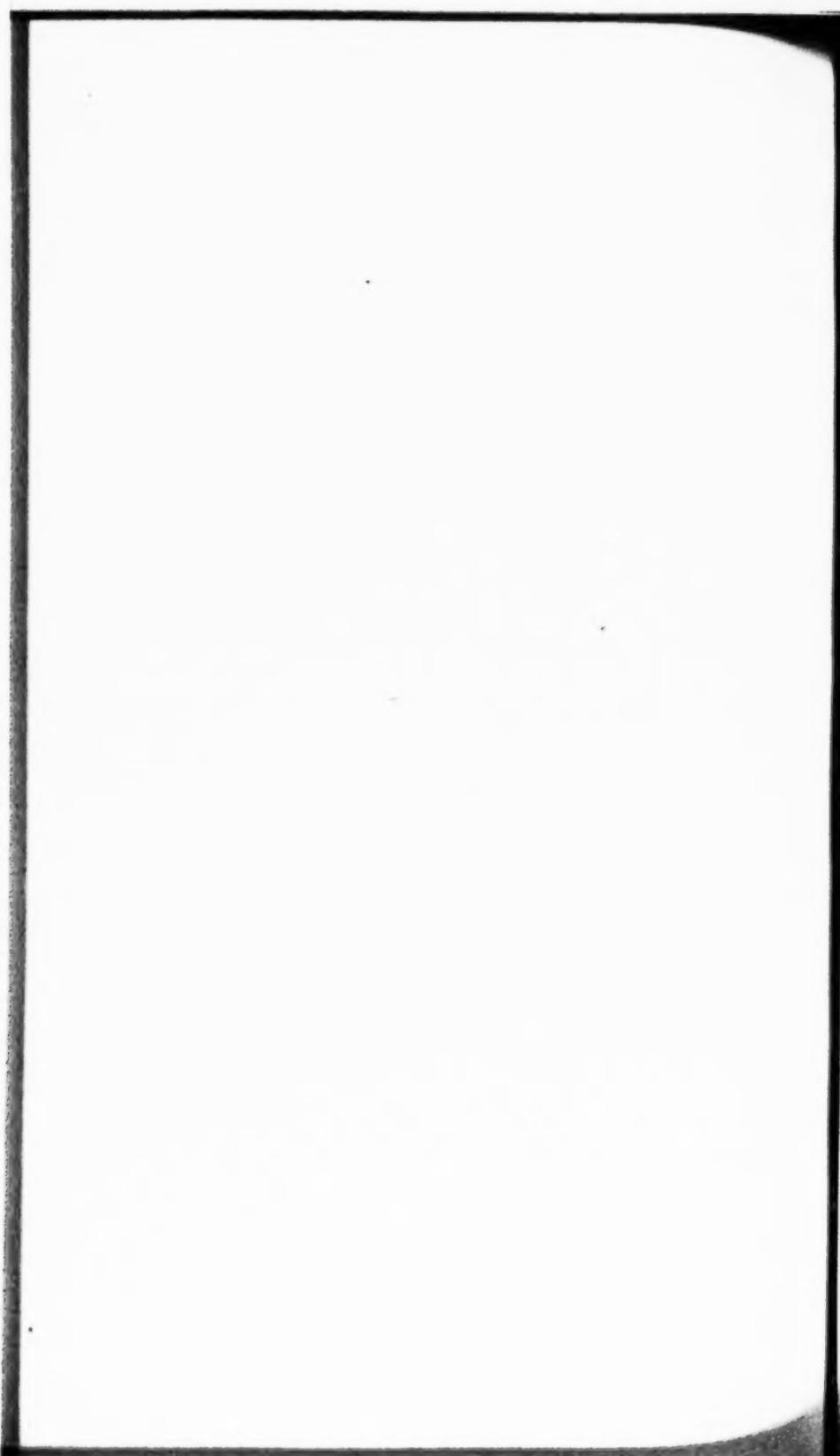
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IN THE  
**SUPREME COURT OF THE UNITED STATES**

---

OCTOBER TERM, 1970

---

**No. 785**

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NATIONAL LABOR RELATIONS BOARD,  
*Petitioner,*

VS.

THE NATURAL GAS UTILITY DISTRICT OF  
HAWKINS COUNTY, TENNESSEE,  
*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SIXTH CIRCUIT

---

**BRIEF FOR THE NATURAL GAS UTILITY DISTRICT  
OF HAWKINS COUNTY, TENNESSEE**

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**I. STATUTES INVOLVED**

In addition to the statutes involved referred to on page 2 of petitioner's brief, certain other relevant provisions of the Tennessee Code (Sections 5-501, 5-601, 6-1507, 6-2617, 6-2608, 6-2612, 6-318, 6-604, 8-3811 and 9-1202[a]) Article 6, Section 15 of the Constitution of the State of Tennessee; Tennessee Private Acts of 1963, Chapter 8, Sec-

tion 4, and Sections 117-13, 117-18(6), and Section 117-16 of the General Statutes of North Carolina, are set forth in the Appendix, *infra*, pp. A1-A13.

## II. ANSWER TO "QUESTIONS PRESENTED"

Respondent disagrees with petitioner's statement of the "Questions Presented." "Whether federal rather than state law governs the determination, under Section 2(2) of the National Labor Relations Act, whether an entity created under state law is a political subdivision of the state and, therefore, not an employer subject to the Act," is not the true issue in this case. Respondent agrees that state law is not controlling, but is merely one factor to be considered.

Petitioner has stressed only a few sentences from the opinion of the Court of Appeals below, which opinion is several pages long (R. 149-155) and, it is submitted, the petitioner has created and presented a false issue here that the Court of Appeals' decision was solely based on the state characterization of a utility district as a "municipality".

Respondent's explanation for the few sentences stressed by the Board is the same as the Board's explanation, in footnote 14, page 19 of its brief, about one of its decisions holding state law to be *controlling*, "the language was not necessary to the result reached."

An examination of the entire opinion of the Court of Appeals compels the conclusion it was correctly decided and is in agreement with the rule of *National Labor Relations Board v. Randolph Electric Membership Corporation*, 343 F.2d 60, repeatedly cited by the Board as the "law of the case", and the case it relied on as creating a "conflict" when seeking certiorari to this Court.

Actually, the so-called coverage determination here, in fact, involves whether or not the Board has jurisdiction. The Board originally bestowed jurisdiction on itself and, thereafter, has repeatedly<sup>1</sup> refused to reconsider same.

Jurisdiction can be raised at any time in a proceeding. In *National Labor Relations Board v. Mark J. Gerry, Inc.*, 355 F.2d 727, Cert. Denied, 385 U.S. 820, the court refused to enforce that portion of a board order cancelling a labor agreement and stated, in footnote 1, on page 729, the following:

"We disagree with counsel that the matter may not now be considered because respondent failed to object when the case was still before the Board. The question is one of whether the Board acted in excess of its jurisdiction and hence can be asserted initially in an enforcement proceeding for, as the Supreme Court said . . .

'Since the court is ordering entry of a decree, it need not render such a decree if the Board has patently traveled outside the orbit of its authority so that there is legally speaking no order to enforce. *N. L. R. B. v. Cheney California Lumber Co.*, 327 U. S. 385, 66 S. Ct. 553, 554, 90 L.Ed. 739 (1946).'

Moreover, the matter was called to the Board's attention. The record reveals that respondent duly excepted to the order on the ground that 'the Labor Board does not have jurisdiction to cancel or modify vested rights of a binding valid contract of the employees'.<sup>2</sup>

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1. Respondent raised the question of jurisdiction to the Board at least three times in addition to the original hearing. (R. 1-2)

2. Also see *National Labor Relations Board v. Alside Inc.*, 192 F.2d 678, 679. The court said in reference to enforcing a Board order: "This raises a question of jurisdiction, and we must entertain it." (Emphasis added) Accord: *National Labor Relations Board v. Cowell Portland Cement Company*, 198 F.2d 198.

In *Cardillo v. Liberty Mutual Co.*, 330 U.S. 469, 473 (1947), it was stated by this Court:

"In reviewing an administrative order, it is ordinarily preferable where the issue is raised and where the record permits an adjudication, for a federal court first to satisfy itself that the administrative agency or officer had jurisdiction over the matter in dispute."

Since the great majority of the facts are here agreed to, and this is basically a jurisdictional matter, many of the cases cited by the petitioner relating to the efficacy of Board findings of fact on appeal are not here controlling.

The correct standard in this case for the appellate court is that stated in *Randolph*, *supra*, at page 62:

"To the extent that it has taken into account economic realities as well as the statutory purposes, the Board's determination is entitled to great respect." (Emphasis added)

### III. ANSWER TO "STATEMENT"

#### A. The Board's findings of fact.

Respondent agrees in part with this portion of petitioner's brief. On page 3 of its brief, the petitioner states: "The facts with respect to the District's status as an employer under the Act are as follows."

The petitioner then sets out some facts and also some argumentative conclusions which it calls facts; also it does not list many other uncontested facts in this record with respect to the District's status as an employer under the Act.

Respondent desires to set out the following additional undisputed facts:

(a) The Natural Gas Utility District of Hawkins County, Tennessee, is only one of nearly 270 utility districts in the 95 counties in the State of Tennessee. (R. 102)

(b) Any district established under the Utility District Law of 1937 (R. 22-54) is specifically empowered under Section 6-2608, Tennessee Code Annotated:

"to conduct, operate and maintain a system or systems for the furnishing of water, sewer, sewage disposal, natural gas, artificial gas, police, fire protection, garbage collection and garbage disposal, street lighting, parks and recreational facilities, transit facilities, etc., or two or more of said systems—and to carry out such purpose it shall have the power and authority to acquire, construct, reconstruct, improve, better, extend, consolidate, maintain and operate such system or systems within or without the district - - -." (R. 43-47)

(c) The Utility District Act was passed by the Tennessee legislature to provide a municipal corporate arrangement to furnish certain needed governmental services, usually in small towns and rural areas, including, but not limited to, the foregoing listed services; these services were not, and, usually could not be, otherwise provided (R. 103); Section 6-2607, T.C.A., provides that the district, when formed, "shall be the sole public corporation empowered to furnish such services," so long as the district continues to furnish any of the services which it is herein authorized to furnish. (R. 41)

(d) The County Judge who appoints the first commissioners, and who fills vacancies in the event the commissioners cannot agree among themselves, is himself a publicly elected official, as provided by the Tennessee Constitution. (R. 39, 49; App., infra, pp. A12-A13)

(e) Commissioners serve with only very nominal compensation. (R. 50)

(f) By Section 6-2613, T.C.A., utility districts are specifically exempt from state regulation by the Tennessee Railroad and Public Utilities Commission, even though privately owned public utilities are specifically covered. (R. 29)

(g) Section 6-2615, T.C.A., designates a utility district's records as "public records". (R. 50)

(h) Apart from the Utility District Act, Section 6-318, T.C.A., "Municipal Property and Services," Section 6-604, T.C.A., in the municipal corporation section, and Section 9-1202, T.C.A., dealing with revenue bond refinancing, refer to and/or characterize a utility district as a "municipality". (R. 87-88; App., infra, pp. A1-A3, A4, A10)

(i) Under several federal statutes, including 42 U.S.C. 418 (and its counterpart in the Tennessee Code, §8-3811), recognition is given to the fact that a utility district is a governmental entity; and arrangement is provided for voluntary coverage to provide social security benefits to district employees, rather than mandatory coverage required of non-governmental entities. (R. 87)

(j) Interest earned on a utility district's bonds is exempt from Federal Income Tax. (R. 86)

(k) A district's bonds are tax exempt, except for estate, inheritance and transfer taxes. (R. 36-37)

(l) The district is required to publish its annual statement in a newspaper of general circulation by Section 6-2617, T.C.A. (R. 31-32)

(m) The district not only has the power of eminent domain, as petitioner mentions, but can exercise it even against other governmental entities. (R. 28-29)

(n) The state legislature passed this act to provide a municipal corporate arrangement to furnish certain required services not feasibly done otherwise. (R. 82, 103)

(o) Section 6-2612 of the Utility District Act is a general grant of power and vests in the district "all the powers necessary and requisite—capable of being delegated by the legislature." (Emphasis added) (R. 29)

(p) Section 6-2614, T.C.A., as amended, provides that in certain counties, the three commissioners be appointed until the first of the month following the next general election and, at that election, the commissioners be elected for terms of 2, 4 and 6 years by the qualified voters of the district. (R. 49)

(q) Vacancies, other than those filled as above, are filled by vote of the remaining commissioners. If they fail to agree, the fact is certified to the County Judge, who appoints the new commissioner. (R. 49)

(r) The general ouster law of Tennessee, available for ouster or removal of elected officials, applies to the district's commissioners. (R. 30; see notes after §6-2614, T.C.A.)

(s) Under a recent amendment to Section 6-2617, T.C.A., a copy of the annual statement or audit for the district must be forwarded to the office of the controller of the Treasury of the State of Tennessee within thirty (30) days from the date of its publication. A copy of such annual statement or audit must be filed with a County Judge or Judges. (App., infra, p. A9)

It is submitted, the true questions presented here are

(1) Whether or not under existing federal law, the Board properly determined petitioner was "an employer"

under Section 2(2) of the Act and not exempt as a "political subdivision".

(2) Whether or not the Court of Appeals under existing federal law and applying the correct standard of judicial review properly denied enforcement of the Board order since petitioner was exempt as a "political subdivision".

On page 4 of petitioner's brief, the following are listed among the alleged facts with respect to the district's status as an "employer" under the Act:

"The powers of the district are vested in and exercised by the three-member board of commissioners, who are not subject to state or county regulation. (Emphasis added). Neither the state nor the county has any control over the District's employees, and they are not considered state or county employees . . ." (Emphasis added)

It is submitted that these statements, rather than being facts, are actually dubious and/or argumentative conclusions when considered in the light of all the truly undisputed facts, including (a) through (s) listed on pages 5 through 7, supra.

It is further clear that similar conclusions of the Board, in its Decision and Direction of Election, either are not supported by any evidence in the record or are improper interpretations of same. (R. 61-66)

For instance, the Board concludes (a) that "the respondent conducts its business without supervision of the State or any political subdivision thereof", and (b) the district is "not administered by State-appointed or elected officials." (c) It is further concluded by the Board that "the Employer is completely autonomous in the conduct of its day-to-day affairs, with the State exercising no

supervisory role with respect thereto, or reserving any power to remove or otherwise discipline those responsible for the Employer's operations." (R. 62-64)

Also, as a footnote (footnote 2 on page 4 of its brief), the Board summarily disposes of the very compelling fact that the law provides in districts of a certain size that the commissioners are elected by the qualified voters in general elections. While, as the Board indicates, this does not apply to Hawkins County, does this fact not rather clearly show the political nature of a utility district?

One other observation must be made about the facts. Section 6-2613, T.C.A. (R. 29), specifically exempts a district from the regulation by the State Railroad and Public Utilities Commission required of a private utility. This is done because of a district's governmental nature.

What is significant about this is that the National Labor Relations Board has misunderstood the significance of this exemption from state regulation throughout this entire proceeding.

#### **B. The decisions of the Board and the Court of Appeals.**

In its brief, on page 6, petitioner, in referring to the initial board decision, states that despite the fact that the Supreme Court of Tennessee had characterized districts as "arms or instrumentalities" of the state,

"The Board examined the relevant factors and concluded that the District was 'an essentially private venture with insufficient identity with or relationship to the State of Tennessee to support the conclusion that it is an exempt governmental employer under the Act.' "

There is, however, that large number of relevant factors above set out which are in this record and which the Board apparently has failed to consider.

Similarly, in reference to the Court of Appeals' decision, on page 7 of its brief the Board quotes only several sentences from the very end of the opinion below in order to persuade this Court that the Court of Appeals' decision was based solely on a state characterization. What petitioner does not do is recognize that the Court of Appeals below had, for several pages, followed the *Randolph* rule but merely distinguished the facts.

As aforesaid, respondent's explanation here for the few sentences stressed by the Board is exactly the same as the Board's explanation, in footnote 14, on page 19 of its brief, of its own 1960 ruling in *New Bedford, etc., Steamship Authority*, 127 NLRB 1322, holding state law controlling, namely that the language "was not necessary to the result reached."

Accordingly, the following is also quoted from the opinion below reported at 427 F.2d 312 on page 313, so that this Honorable Court may view that opinion as a whole:

"Section 6-2607 of the Tennessee Code, under which the Utility District was organized, provided that a District is a 'municipality or public corporation in perpetuity under its corporate name and the same shall be in that name a body politic and corporate with power of perpetual succession, but without any power to levy or collect taxes.'

The Supreme Court of Tennessee construed this statute in *First Suburban Water Util. Dist. v. McCanless*, 177 Tenn. 128, 146 S.W.2d 948 (1941), and held that a District organized under it was a municipal corporation and as such was an arm or instrumentality of the state.

The Board declined to follow the decision of Tennessee's highest court, relying instead on *NLRB v. Randolph Elec. Membership Corp.*, 343 F.2d 60 (4th Cir. 1965), which case involved private non-profit utility corporations organized under the laws of North Carolina, which were formed for the exclusive benefit of their own members, did not have the power of eminent domain, were not subject to substantial control or supervision, and did not exercise any portion of the sovereign power of the state. The Board reasoned:

'The Utility Districts are not created directly by the State. They are formed by petition of property owners upon a County Judge's determination of the feasibility thereof. Thus, the District is no more a direct creation of the State than such privately-owned public service companies as railroads, and motor carriers, which also require some form of governmental approval, such as a certificate of convenience and necessity.' (App., p. 15 n. 7).

This reasoning is obviously fallacious because privately owned railroads and motor carriers, even though they may have certificates of convenience and necessity, are operated for profit of their owners, whereas the District is owned and operated by the state, and not for the profit of private individuals. The District, unlike railroads and trucking companies, is a public corporation and was not subject to regulation even by the State Public Utilities Commission, and was exempt from all state taxes.

Reliance by the Board on *Randolph* is misplaced. In *Randolph*, unlike our case, there was no holding by the state's highest court that the private utilities were political subdivisions of the state.

In *Randolph* the private utilities were 'formed for the exclusive benefit of its own members.' Here, the District was formed for the benefit of the inhabitants of the community.

In *Randolph*, the utilities involved did not have the power of eminent domain. Here, the District not only has the power of eminent domain but also can exercise it over other governmental entities.

The Commissioners of the District further have the power to subpoena witnesses and to administer oaths. The District's records are 'public records.' The District is required to publish its annual statement in a newspaper of general circulation. Income from its bonds is claimed to be exempt from federal income taxes. Social Security benefits for its employees are voluntary instead of mandatory as the District is considered 'a political subdivision' under 42 U.S.C §418(5).

In our opinion, it was not necessary that the District be created directly by the state in order to constitute a political subdivision. It is sufficient if the District be created in conformity with state law.

It should be noted that the Act does not require agencies of either federal or state governments to be created directly. As a matter of fact, wholly owned government corporations, including the Federal Reserve Bank and even non-profit hospitals, are specifically exempt.

Under Tennessee law the District is created by petition to the county judge, an elected official, who must find a public convenience and necessity therefor. The county judge appoints the first three commissioners nominated in the petition seeking formation of the District, and fills vacancies in the event the commissioners cannot agree among themselves. In counties having a population of 482,000 or more the commissioners of the Districts are elected at regular general elections. Although the District involved in the present case did not have the requisite number of residents to necessitate the election of its commissioners, this factor indicates that Tennessee considers the functions of a District to be that of a 'political

subdivision' requiring election of commissioners by the electors when the District encompasses a specified population." (R. 150-152)

Another ground for the decision herein by the Court of Appeals for the Sixth Circuit was that the Board had not here even followed its own prior decisions, 427 F.2d 31, 314 (R. 152-153) citing *Mobile Steamship Authority, etc.*, 8 NLRB 1297 (1938); *Oxnard Harbor District*, 34 NLRB 1285 (1941); *New Jersey Turnpike Authority*, 33 LRRM 1528 (1954); *New Bedford, Wood's Hole, Martha's Vineyard, etc., Steamship Authority*, 127 NLRB 1322 (1960).

Also the late Board decision, *City of Austell Natural Gas System and International Chemical Workers Union*, 186 NLRB #44, decided October 31, 1970, is nearly identical to the case at bar except that this case holds the gas system exempt under Section 2(2) of the Act.

Accordingly, it is submitted, petitioner in its brief, as it has done since its earliest decision in this matter, has failed to consider all the undisputed facts in the record.

Petitioner has also failed to adequately set forth and explain the opinion below of the Court of Appeals for the Sixth Circuit.

#### **IV. SUMMARY OF ARGUMENT**

##### **I.**

The real issue in this case is not whether federal or state law controls in determining whether an entity is a political subdivision within Section 2(2) of the Act. Respondent concedes that state law is not controlling but is merely one factor in the determination. The real ques-

tion here is whether the Board properly determined that the respondent utility district was not exempt. And the further question is whether the Court of Appeals properly denied enforcement of the Board's order because respondent is exempt.

Respondent agrees with and accepts the rule of the *Randolph* case, *National Labor Relations Board v. Randolph Electric Membership Corporation*, 343 F.2d 60, "To the extent that it has taken into account economic realities as well as the statutory purposes, the Board's determination is entitled to great respect." Respondent contends the Board inadequately considered the economic realities and the statutory purposes, and the Court properly did not enforce its order.

It is the position of the respondent, based on the factors that the Board included in its Decision and Direction of Election, as contrasted with the factors listed by the Court of Appeals below, whether the matter be considered in terms of the totality of the picture, or of the strength of the particular economic factors, that the Board inadequately considered the economic realities and, therefore, improperly determined that the utility district was not exempt. On the other hand, the Court of Appeals fully and completely considered the economic realities and decided that the utility district was exempt as a political subdivision.

It is, further, the position of the respondent that the language from the opinion of the Court of Appeals so strongly relied upon by the Board to create the issue that state law is controlling, must be considered in light of the entire opinion of the Court, wherein it examined numerous relevant economic factors at length. The language so relied upon by the Board to create this issue and also

to create the "conflict", which was the basis of this Court granting certiorari, is, at most, "not necessary to the result reached." (This is the same characterization that the Board gave, in its brief in footnote 14 on page 19, to the language from its decision in *New Bedford, etc. Steamship Authority*, 127 NLRB 1322, a 1960 decision, holding state law to be controlling!)

In reference to the particular factors that are considered important, the Board has introduced what appears to be a new factor: "how the employment relations are carried on", which factor does not appear in any of its decisions heretofore, or since; the Board states on page 15 of its brief that "this factor is controlling", even though, on page 11 of its brief, the Board quotes, although in not exactly the same words as in the *Randolph* case, what it characterizes as how it has "limited the exemption on a national basis to entities that are (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." (The second part of this actually reads in the *Randolph* decision, instead of the language as used by the Board, "administered by state appointed or publicly elected officials." There is a substantial difference, as will be pointed out hereinafter, between the language in the *Randolph* case and the language as changed in the Board's brief.)

In any event, in addition to all the other strong factors present in this case, the Board completely misunderstands the fact that a county judge who appoints respondent's commissioners and fills vacancies is to a county the same as a mayor is to a city or a governor to a state. This office is not only created by the Tennessee Constitution but is specifically made therein one elected by

the qualified voters. The Board further misunderstands the fact that just as an actual employee, such as a city garbage collector or a state highway patrolman, is not supervised directly by either the mayor or the governor, that, similarly, the district's employees are not supervised directly by the county judge. There are middle management supervisory employees in a city, a state and a utility district.

It is the position of respondent that of all the cases wherein the political subdivision has been granted none has as many factors, or as strong factors, as does the district here.

## II.

As far as judicial review is concerned, it is submitted that the utility district repeatedly has raised the question of jurisdiction before the Board, but the Board, once having bestowed jurisdiction upon itself, repeatedly refused to reconsider same.

It is further submitted that since most of the facts herein are agreed upon, and since this is a jurisdictional and/or a coverage matter which does not address itself to the expertise of the Board in the usual sense, many of the cases cited by the Board dealing with the efficacy of Board findings of fact on appeal are not here controlling. Nor is the Board's contention correct that this was improperly tried *de novo* by the Court of Appeals. The Court of Appeals followed the standard of judicial review set forth in the *Randolph* case, but simply held that the Board had not adequately considered the relevant factors and properly refused to enforce the Board's order.

## V. ARGUMENT

### Background

The issue in this case is not whether federal rather than state law governs the determination, under Section 2(2) of the National Labor Relations Act, whether an entity created under state law is a "political subdivision" of the state, and therefore, not an "employer" subject to the Act. Petitioner agrees that state law is not controlling, but is only one factor to be considered.

However, the present status of the case of *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111, on which the Board so heavily relies on pages 9 and 10 of its brief, is doubtful. Congress' adverse reaction to this Court's interpretation of the Act in the *Hearst* case is clearly manifested by the legislative history of the Taft-Hartley amendments to the definitions of "employer" and "employee":

"It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended . . . that the Board give to words not far-fetched meanings but ordinary meanings." (Emphasis added.)

.....

"The Board (in *Hearst*) expanded the definition of the term 'employee' beyond anything that it had ever included before, and the Supreme Court, relying upon the theoretic 'expertness' of the Board, upheld the Board . . . It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. . ." H.R.Rep. No. 245, 80th Cong., 1st Sess. 18 (1947)

**THE TRUE QUESTIONS PRESENTED HERE ARE:**

- (1) Whether or not under existing federal law, the Board properly determined petitioner was "an employer" under Section 2(2) of the Act and not exempt as a "political subdivision".
- (2) Whether or not the Court of Appeals under existing federal law and applying the correct standard of judicial review properly denied enforcement of the Board order since petitioner was exempt as a "political subdivision".

The correct effect of a determination by the Board as to whether an entity is or is not a "political subdivision" is, as aforesaid, set forth by the Court of Appeals for the Fourth Circuit in the case of *National Labor Relations Board v. Randolph Electric Membership Corporation*, supra, ". . . to the extent that it has taken into account economic realities as well as the statutory purposes, the Board's determination is entitled to great respect."

Among those economic realities is state law, as set forth in the statutes of the state and the judicial holdings of state courts. Various Board decisions, as set forth hereinafter, hold that state law is to be considered as one of the factors, but that state law will not "exclusively" control. Interestingly enough, some Board rulings have held state law to be controlling; the Board often relies on state law when it supports its position!

It is submitted that the Court of Appeals below followed the *Randolph* rule, properly considered whether the Board followed the correct procedure and, finding that the Board did not adequately and properly consider the economic realities, as well as the statutory purposes, and/or evaluate the total picture, did itself then consider

all of the economic realities, including state law, and correctly determined that the respondent utility district is a "political subdivision" of the State of Tennessee.

### 1. The total picture.

An examination of the Board's Original Decision and Direction of Election shows that the Board apparently considered only the following criteria in its determination and did not, in fact, follow the *Randolph* rule:

1. The respondent is organized to supply gas utility service without profit. (R. 62)
2. "The Respondent conducts its business without supervision of the State or any political subdivision thereof. It hires its own employees and sets their terms and conditions of employment."<sup>3</sup> (R. 62)
3. It has the usual powers of a private corporation to sue and to be sued, to incur obligations, issue bonds, sell and encumber its property and enter into contracts necessary or convenient to the exercise of its granted powers. (R. 62)
4. It then considered state statutes and state court decisions and stated "while such state law, declarations and interpretations are given careful consideration by the Board, they are not necessarily controlling." (R. 63)

The Board then mentioned the *Randolph* rule and reached its determination that the petitioner was not exempt.

The Board did not follow, or even mention, the ruling of its own Regional Director, dated one month earlier, that the Utility District of Weakley, Carroll, and Benton

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3. This, it is submitted, is, in part, an argumentative conclusion.

Counties, Tennessee was exempt as a political subdivision. This district is identical to the one in the case at bar. (R. 110-112)

Further, even in its brief in this Court, the Board still has mentioned only a few of the relevant undisputed factors which have been heretofore pointed out, although in footnote 14 on page 18 of its brief it insists "The Board also considered the other factors urged by the District in support of its claimed exemption."

In contrast to the approach of the Board was the approach of the Court of Appeals. The Court considered many more factors than the Board. The following are some of the factors listed by the Court of Appeals:

(1) The Court of Appeals considered that both the Tennessee legislature by Section 6-2607, T.C.A., and the Tennessee Supreme Court in *First Suburban Water Utility District v. McCanless*, 177 Tenn. 128, 146 S.W.2d 948 (1941) had determined a district to be a "municipality". (R. 150)

(2) The Court of Appeals referred to the fact, in distinguishing the *Randolph* case, that the utility district has the power of eminent domain, and even has it against other governmental entities. (R. 150-151)

(3) The Court of Appeals declined to agree with the conclusion of the Board that "the District is no more a direct creation of the State than such privately owned public service companies as railroads, and motor carriers, which also require some form of governmental approval such as a certificate of convenience and necessity." (R. 150-151)

As the Court of Appeals pointed out, "This reasoning is obviously fallacious because privately owned railroads and motor carriers, even though they may have certifi-

cates of convenience and necessity, are operated for profit of their owners, whereas the District is owned and operated by the state, and not for the profit of private individuals. The District, unlike railroads and trucking companies, is a public corporation and was not subject to regulation even by the State Public Utilities Commission and was exempt from all state taxes." (R. 151)

(4) The Court of Appeals further distinguished the *Randolph* case by showing that the electric membership cooperative in *Randolph* was formed for the exclusive benefit of its own members.

In its brief on pages 16 and 17, the Board still shows it does not understand the difference between the electric membership cooperative in *Randolph* and a Tennessee utility district. This will be further discussed hereinafter.

It is submitted that, contrary to the Board's statement, membership in the North Carolina cooperative is not available to all applicants, and inhabitants of the area may be served from other sources, but that the Tennessee utility district is the exclusive source of the service for all persons in its district. (R. 150)

(5) The Court of Appeals relied on the facts that the district had the power to subpoena witnesses and administer oaths. (R. 151)

(6) The Court of Appeals considered that a district's records are "public records". (R. 151)

(7) The Court considered that a district is required to publish its annual statement in a newspaper of general circulation. (R. 151)

(8) The Court of Appeals considered that income from a district's bonds is "claimed to be exempt from federal income tax." (R. 151)

(9) The Court of Appeals considered that social security benefits for a District's employees are voluntary instead of mandatory, as a District is considered a political subdivision under 42 USC §418(b). (R. 151)

(10) The Court of Appeals also stated that it was not necessary that the District be created directly by the state. "It is sufficient if the district is created in conformity with state law." (R. 151)

(11) The Court of Appeals pointed out that certain wholly owned government corporations including the Federal Reserve Bank and even non-profit hospitals are specifically exempt. (R. 151-152)

(12) Further, the Court of Appeals referred to the fact that the District is created by petition to the county judge, an elected official, who must find a public convenience and necessity. (R. 152)

(13) The Court of Appeals referred to the part of the statute that provides that in counties of a certain size, the commissioners are elected at regular general elections. (R. 152)

The United States Supreme Court has held that the Board should consider all the relevant factors.

In the case of *National Labor Relations Board v. Jones and Laughlin Steel Corporation*, 331 U.S. 416 (1947), an order of the National Labor Relations Board with reference to which union should represent certain employees was involved. The Court stated:

"The proper determination as to any of these matters, of course, necessarily implies that the Board has given due consideration to all the relevant factors. . . ." (Emphasis added)

Under this rule, the Board must consider all of the relevant factors and not give consideration only to those factors which support its decision.

## 2. Particular Factors.

### A. Eminent Domain:

The Board dismisses the possession by the District of the right of eminent domain as a controlling factor, even though the Board itself, in *New Jersey Turnpike Authority*, 33 LRRM 1528 (1954), has held the presence of the power of eminent domain to be a determinative factor in determining an entity to be a political subdivision. Thus, the Board, as pointed out by the Court of Appeals below, has not followed its own decisions, including the *New Jersey Turnpike Authority* case.

### B. State Law:

The Board has wandered all over the map as to the effect of state law.

In the Board's 1960 decision of *New Bedford, Wood's Hole, Martha's Vineyard, etc., Steamship Authority*, supra, it was held that the entity considered in that case was a political subdivision, which decision was controlled by state law. The Board in its brief herein states, in footnote 14 on page 19, that "The language in New Bedford - - - was not necessary to the result reached there."

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4. It is quite important that the Board recognizes this rule because, similarly, the two paragraphs in the Court of Appeals' opinion so strongly relied on by the Board here (see page 7 of its brief) are not necessary to the result reached below!

Also, in the very late case of *Lewiston Orchards Irrigation District*, 186 NLRB #121, 75 LRRM 1430 (Nov. 25, 1970), the Board stated that it does consider "a state code and its interpretation by the state courts", though it says it does not give controlling weight to same, in determining whether an entity is an "employer" for purposes of the National Labor Relations Act, citing *International Brotherhood of Electrical Workers*, 87 NLRB 99, 100-101 (state law was the *only* thing considered by the Board in that case).

In the *Lewiston* case, the Board, in its decision, gave considerable weight to the state court decision of *Lewiston Orchards Irrigation District v. Gilmore*, 53 Idaho 377, 23 P.2d 720 (1933).

Yet almost grudgingly on page 15 of the Board's brief herein, it is stated "a state's characterization - - - is a factor to be considered."

Could it possibly be, the Board follows state law when its position is supported thereby?<sup>5</sup>

### C. Operations for profit:

The Board pays little attention here to the fact that a district is a non-profit entity. It has even analogized a district to a railroad or motor carrier. The Court of Appeals below correctly distinguished between the two types of entities when it pointed out that public service companies are for profit of their owners, whereas the district is not operated for the profit of anyone, including private individuals.

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5. The Board, in footnote 7 on page 13, even includes some language from a Tennessee Court of Appeals decision about utility district employees which it must feel is favorable to its present position! *Weakley County Municipal Electric System v. Vick*, 43 Tenn. App. 524, 309 S.W.2d 792, 796.

This distinction is correct and is recognized in such decisions of the Board as *Lewiston Orchards Irrigation District*, *supra*, wherein it was pointed out that the irrigation district was created and was operated for the benefit of the particular member landowners. The respondent utility district is created and operated for all of the residents of the district.

#### D. Other Federal Evaluations of the Character of a Utility District

The Court of Appeals properly gave weight to the uncontested claim that income from a district's bonds is exempt from U. S. Income Tax.

This is under the well known provision of the tax law exempting from U. S. Income Tax so called "tax-free municipals" (municipal bonds).

Also, the Court of Appeals, as has the Board in other cases,<sup>6</sup> considered the voluntary, as opposed to mandatory, coverage of a district's employees for purposes of U. S. Social Security Tax.

The Board has little to say about these evaluations by other federal agencies of a Tennessee utility district, except in footnote 10 on page 15 of its brief, "Nor do we take any position on whether these districts are not political subdivisions under other federal legislation."

It is submitted that these evaluations are significant.

#### E. "Administered by individuals who are responsible to public officials or to the general electorate."

In its brief, on page 11, the Board states it has heretofore only granted the exemption to entities (1) "cre-

6. See *City of Austell Natural Gas System*, *supra*; also the lack of such voluntary social security coverage was a factor in *Randolph*, *supra*.

ated directly by the state" or (2) administered by individuals who are responsible to public officials or to the general electorate."

The Board has not only by this wording changed the criteria from the *Randolph* case, as will hereafter be pointed out, but also it has glossed over the following facts in this record:

- (a) The County Judge, an office created by the Tennessee Constitution and whose election by the qualified voters is provided for therein, must hold a hearing, determine the "convenience and necessity" and then appoint as commissioners "those persons nominated in the petition." (R. 39)
- (b) The Board further assumes the foregoing must be done by the County Judge as an automatic act.

It is basic administrative law that the power to appoint includes the power *not* to appoint, or to reject. The following quote from *McQuillin, Municipal Corporations*, 3rd Edition, Revised, Vol. 3, Section 1270, is appropriate: "The power to appoint an officer confers upon the appointing power the right of deciding the question of the competency of applicants for the services to be performed."

- (c) The Board summarily disposes, by footnote 2 on page 4 of its brief, of the fact that the law provides for the election of utility district commissioners by all qualified voters in counties of a certain size.
- (d) Further, under certain circumstances, the County Judge fills vacancies in the office of utility district commissioners. It is provided in Section 6-2614, T.C.A.:

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7. See also 42 American Jurisprudence, Public Officers, § 90, pp. 92-99, indicating that the power to appoint to public office involves discretion.

"Any vacancy shall be filled . . . by vote of the other commissioners then in office. In the event the two (2) commissioners cannot agree upon a new commissioner to fill any vacancy, they shall certify that fact to the county judge or chairman of the county court within thirty (30) days of the date upon which such vacancy occurs, and, thereupon, within ten (10) days the county judge or chairman of the county court shall appoint a third commissioner to fill such vacancy." (R. 49)

- (e) Finally, the general ouster law of the state covering publicly elected officials has been specifically held applicable to utility district commissioners.
- (f) By a late amendment to Section 6-2617, T.C.A., a copy of the annual audit statement for the district must be forwarded to the office of the Controller of the Treasury of Tennessee within 30 days from the date of its publication, and a copy of same must be filed with the County Judge.
- (g) Power to subpoena and administer oaths.

These powers, although mentioned by the Board in its brief here (page 5), are not considered important.

The Court of Appeals, however, also considered these powers.

It is respectfully submitted that it is a rare railroad or motor carrier that possesses such powers.

- (h) Nature of services rendered by districts.

The truly governmental nature of a district can be seen when it is remembered the types of service rendered include practically all the types of service rendered by any city or town.

There are 270 districts in Tennessee, and many render more than one type of service.

Such typical governmental services as fire protection, police, garbage disposal, sewage disposal, as well as the sale of gas or electricity and many others are rendered by districts, as well as cities and towns, but by very few private companies operated for profit.

- (i) The standard of the Board for determining the political subdivision exemption.

In its brief, the Board states the following, commencing on page 11 of its brief:

"In administering the Act on a national basis, the Board has limited the exemption for political subdivisions to entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate. *National Labor Relations Board v. Randolph Electric Membership Corporation*, 343 F.2d 60, 63-64, N.7 (C.A. 4). This test provides a reasonable and uniform standard for differentiating between essentially private employment relations and those controlled by the state or its components to such an extent that they are properly exempted from statutory coverage."

It is submitted that, in fact, the Board's standard rather than being "reasonable and uniform", not only seems to have varied from case to case, but has been arbitrary and unpredictable.

It has been held that it is not the duty of the Board to determine which employers *should* be within the purview of the Act, but rather which employers *are* within its legal jurisdiction. *Local 833, United Auto Workers*, 116 N.L.R.B. 267, 272 (1956), relying on *Colgate-Palmolive-*

*Peet Co. v. National Labor Relations Board*, 338 U.S. 355, 363 (1949).

In *Local 833, United Auto Workers*, *supra*, the Board said:

"The Board's function is to carry out the mandate of Congress embodied in the National Labor Relations Act, as amended. The Board cannot modify the statute to conform to its own notion of desirable policy", citing the *Colgate-Palmolive* case, *supra*.

In the *Colgate-Palmolive* case, *supra*, this Court said:

"It is enough that we find it in the statute, that policy cannot be defeated by the Board's policy - - -. The Board cannot ignore the plain provisions of a valid contract - - - and reform it to conform to the Board's idea of correct policy. To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress - - -."

In its brief here, the Board has actually changed the standard from that it set out itself in its Decision and Direction of Election (R. 61) wherein (R. 64) it states: "The employer in this case is neither created directly by the state, nor administered by state appointed or elected officials." (Emphasis added) This language goes back to identical language in the *Randolph* case.

Herein, in its brief, however, as above quoted, the second part of the standard now is "administered by individuals who are responsible to public officials or to the general electorate." (Emphasis added)

Thus, heretofore, presumably if the administrating official were "state appointed" that would be sufficient to assure the exemption. Now, however, the individual who administers the entity, in order for it to be exempt, must

be "responsible" to public officials or to the general electorate. This change may have been made because a utility district/commissioner appointed by a county judge can be argued to be "state appointed" but, according to the Board's contention, said commissioner is not "responsible" to "public officials or the general electorate."

The Board has, further, added herein an entirely new test, not mentioned in any of its cases awarding the political subdivision exemption, either the earlier or later cases!<sup>8</sup> From its brief on pages 14 and 15, it states "what must be controlling is the manner in which the entity's labor relations are carried on."

To justify its new standard, the Board has, it is submitted, lifted out of context certain language from the *Randolph* decision wherein that court stated that North Carolina's characterization of an entity as a political subdivision is not decisive "since their relation to the state and their actual methods of operation do not fit the label given them." The Board has made the following statement in its brief, starting on page 13:

"Thus, an entity created and operated by private individuals who are free from state control in fixing terms and conditions of employment may none the less be denominated a 'political subdivision' for particular state purposes that have nothing to do with its 'relation to the state and [its] actual methods of operation'."

8. Of course, respondent submits, the utility district commissioner is "responsible to public officials or to the general electorate." See pages 26 and 27.

9. In *National Labor Relations Board v. Howard Johnson Company*, 317 F.2d 1, Cert. Den., 375 U.S. 920, a case in which the exemption was denied, "control of the employment relationship" was held of "paramount significance." That case, clearly distinguishable from the case at bar, involved the operation of a restaurant under contract with the New Jersey Turnpike Authority.

It is submitted that this zealous attempt to justify its new standard is clearly shown by the Board's insertion of the words "who are free from state control in fixing terms and conditions of employment", which, as aforesaid, nowhere appear in the *Randolph* decision, nor do said words appear in any of the Board's prior decisions with reference to "political subdivisions." See footnote 9, *supta.*

When all of this is considered in light of the Board's varying position as to the effect of state characterization, it is submitted, the Board's standard is far from reasonable and uniform. In the very late decision of *Lewiston Orchards Irrigation District*, 188 NLRB #121, denying the political subdivision exemption, just about the only thing relied upon was the Idaho case law and statutes, though the factors involved were fully enumerated.

It is, further, respectfully submitted that even in a situation where an employee works for a city or a state, such as a city garbage collector, or a state highway patrolman, the head of the city or state does not actually "supervise" the employee. The employee is actually supervised by a subordinate employee and not by the mayor or governor, or for that matter, probably not by any elected official.

This is no different from the case of the respondent utility district. Of course, the county judge does not directly supervise the utility district's employees; a supervisor hired by the commissioners of the utility district does so, just as a supervisor hired by the city and not the mayor, "directly" supervises a garbage collector.

In two other of its very late cases wherein the governmental subdivision exemption was approved by the Board, "employment relations" appear to be carried on exactly as the district did.

In *Fayetteville-Lincoln County Electric System*, 183 NLRB #19, 74 LRRM 1278 (June 8, 1970) an electric company was involved. It was established as a result of a private act of the Tennessee Legislature, being Chapter No. 8 of the Private Acts of Tennessee of 1963, Section 4 of which is set out in the Appendix, infra, at pages A10-A11; the utility operates in accordance with the provisions of this Private Act and the Tennessee Municipal Electric Plant Law. Section 6-1507, T.C.A., is the relevant section of the Tennessee Municipal Electric Plant Law, and is copied in the Appendix, infra, at pages A3-A4.

The *Fayetteville-Lincoln County Electric System* is run by a board of public utilities, which board consists of seven members appointed by the mayor and approved by the Board of Aldermen of the city. Two of the appointees must be residents of the municipality and property holders of the municipality. According to Section 4 of the Private Act, "four of the appointees shall own property and reside outside the corporate limits of Municipality, and shall be electric consumers of the consolidated electric system." (Emphasis added) The seventh member of the board must be an alderman of the municipality.

The National Labor Relations Board held that the *Fayetteville-Lincoln County Electric System* was a "political subdivision" and thus not an "employer" within the meaning of Section 2(2) of the Act.

The commissioners of the utility district in the case at bar do not have to own property and do not have to be consumers of gas. They must only be "residents of the district." Section 6-2602, T.C.A. (R. 23)

The Board found in the *Fayetteville* case that "the utility's affairs are administered by a Board of Trustees who are appointed by elected officials." However, the

mayor did not have discretion to appoint anyone he wanted in the city or county. Rather, he was required to appoint property holders and consumers of electricity.

Also in *City of Austell Natural Gas System and International Chemical Workers Union*, 186 NLRB #44, the Board, on October 31, 1970, held that a municipally owned natural gas system was not an "employer" within the meaning of the Act and said nothing about how "the labor relations are carried on."

The system was created by a special act of the state's legislature, was administered by trustees, approved by the city's mayor and council, and had the right of eminent domain.

The system paid no federal or state income tax and no sales tax.

Its employees were placed under social security like city employees.

**3. A. The Board has not here even followed its own decisions.**

The Court of Appeals below commented "The Board had not here even followed its own *prior* decisions."

To this must be added, the Board here has not followed its subsequent decisions."<sup>10</sup>

It is submitted that there is not a single Board decision, before or since, where the total number of relevant factors, as well as the strength of the particular factors,

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10. The Board, acting through its Regional Director, in a case decided one month before the one at bar, held another Tennessee utility district with identical power exempt as a political subdivision. Case #26-RC-2972, *The West Tennessee Public Utility District of Weakley, Carroll and Benton Counties, Tennessee*. (R. 110-112)

so compels the conclusion that the entity is exempt as they do here.

The Court of Appeals cited four prior cases of its own which the Board has not followed. The pertinent factors listed by the Board in each case were:

A. *Mobile Steamship Authority* (1938), *supra*.

1. Created by specific legislation of Alabama.

B. *Oxnard Harbor District* (1941), *supra*.

1. Organized by district residents under enabling legislation of State of California.
2. Governed by board elected by qualified voters
3. Commissioners are subject to recall.
4. Right of eminent domain.
5. County supervisors may tax to pay expenses of district and to pay its bonds.

C. *New Jersey Turnpike Authority* (1954), *supra*.

1. Three members appointed by the governor.
2. Established for purpose of constructing, operating and maintaining turnpikes and to finance same by issuance of bonds.
3. Power of eminent domain.
4. Neither the faith and credit of the state, nor the taxing power, is pledged to the payment of bonds.
5. Bonds and property tax exempt.

D. *New Bedford, Wood's Hole, Martha's Vineyard Steamship Authority* (1960), *supra*.

1. State law characterization controlling.
2. Created by Massachusetts statute.

3. Consists of members appointed and removed by governor with advice and consent of executive council.
4. Must submit annual report to governor and state legislature.
5. Neither its property nor bonds subject to state taxation.

Recently, the Board has decided that two entities, above referred to, are exempt and has listed the following factors:

- A. *Fayetteville-Lincoln County Electric System* (June, 1970), *supra*.
  1. Entity established pursuant to private act of Tennessee legislature in accord with provisions of Tennessee Municipal Electric Plant Law.
  2. Run by a board of seven appointed by mayor and approved by Board of Aldermen. Six of seven must be property holders and four must be consumers of electricity.
- B. *City of Austell Natural Gas System* (October, 1970), *supra*.
  1. System created by special act of legislature.
  2. Administered by trustees approved by mayor and city council.
  3. Right of eminent domain.
  4. Interest income to holders of system's certificates is exempt from Federal Income Tax.
  5. Under social security and workmen's compensation as are city employees.
  6. Pays no Federal or State Income Tax and no State Sales Tax.

It is significant that in none of these cases is there even mentioned the manner in which the entity's "labor relations are carried on," which petitioner here asserts as "what must be controlling." (Pages 14 and 15 of its brief)

Actually, the Board's entire case here seems to rest on the fact that the district's commissioners are not appointed by a governor or a mayor. The Board really gives no weight, or very little weight, to anything else. It has not considered all factors.

It is thus submitted that, not only has the Board not followed the controlling federal law, the *Randolph* rule, but it also demonstrates a complete lack of familiarity with a Tennessee county, which is like counties in many other states. The County Judge who appointed the Hawkins County Utility District commissioners occupies the top executive and administrative position in county government; he is elected by the voters of the county, and he is to the county what the governor is to the state and the mayor to the city. It is submitted, as aforesaid, he also has the implicit right not to appoint, and he does fill vacancies.

Accordingly, as aforesaid, there is not one Board decision awarding the political subdivision exemption in which the factors so clearly compel that result as they do here.

### **3. B. The *Randolph* case distinguished on its facts.**

The Court of Appeals in the *Randolph* case correctly decided that the entity involved in that case was not exempt. Similarly, the Court of Appeals below correctly held that a Tennessee utility district is exempt.

The Court of Appeals here actually followed the rule of the *Randolph* case, *supra*, but distinguished the facts.

The Board in the case at bar compared a North Carolina Electric Membership Cooperative in the *Randolph* case with a Tennessee utility district and erroneously held them to be substantially similar and, on that ground, ruled that the respondent was not a "political subdivision."

The following are the significant differences between the North Carolina and the Tennessee legislation:

(a) Under the Tennessee Utility District Act, the district may furnish one or more types of service, including fire, police, garbage collection, etc., to all persons in the district and has an exclusive franchise for same in the designated area.

However, Section 117-16 of the General Statutes of North Carolina (App., infra, pp. A11-A12) makes it clear that only "members" are entitled to get electric power from the North Carolina Electric Membership Corporation.

Section 117-16 provides as follows: "The corporate purpose of each corporation formed hereunder shall be to render service to its members only - - ." (Emphasis added)

In North Carolina, other members of the public are not entitled to get service from it, and in fact, are prohibited from getting service from it.

The case of *Bailey v. Carolina Power Company*, 212 N.C. 768, 195 S.E. 64 (1938), held that persons not members of the electric membership corporation could not maintain an action challenging the validity of the acts of the director of the corporation, and, that the fact that a person is a member of the community, or a resident of the territory, in which an electric membership corporation is authorized to operate, or might be eligible for membership therein, does not entitle him to service by such corporation.

Thus, a North Carolina electric membership corporation exists solely for the benefit of its members; a Tennessee utility district exists and has the exclusive right to provide governmental services to citizens in certain areas and is similar to a city or town. Further, among the types of services that may be rendered by a utility district, are such traditionally governmental services as fire, police, street lighting, garbage collection, etc.

(b) The Tennessee Utility District Act provides that the district not only has the power of eminent domain, but can exercise it even against other governmental entities. (R. 28-29)

On the other hand, by Section 117-18(6) of the General Statutes of North Carolina (App., infra, p. A12), it is specifically provided that an Electric Membership Corporation does not have the eminent domain power, but, in all questions pertaining thereto, must apply to a different agency whose ruling shall be final.

(c) Section 6-2707, T.C.A. (R. 41), provides that, once formed, a Tennessee utility district shall be the *only* public corporation empowered to perform its services within its district.

On the other hand, it was held in the case of *Pitt and Greene Electric Membership Corporation v. Carolina Power and Light Company*, 255 N.C. 258, 120 S.E.(2) 749 (1961), that a North Carolina electric membership corporation and a privately owned public utility corporation are free to compete in rural areas, unless restricted by contract.

(d) Section 117-13 of the North Carolina Act (App., infra, p. A11) provides that each electric membership corporation shall have a board of directors to be elected annually by the members, and the powers of the corporation shall be vested in said board. This procedure resembles

the election of stockholders and directors of a private corporation and is to be contrasted with that followed to select the commissioners of the Tennessee utility district. Said commissioners are appointed by the County Judge, or are elected at general elections.

Also, of great significance is the fact that profits (similar to dividends) inure to the exclusive benefit solely of the members (similar to stockholders) of the electric membership corporation; while the district, under Section 6-2625, T.C.A. (R. 36), may only charge such rates as to remain self-supporting, and all users in the entire area are affected by rate changes, the same as rates charged by a city and/or a town for governmental services affect all users in the city and/or town.

(e) In respondent's answer to the statement of the case, respondent has set out on pages 4 through 13 certain other factors which lead to the conclusion that the utility district is a "political subdivision." None of these factors are provided for under the North Carolina Act.

**4. The Court of Appeals below under existing federal law and applying the correct standard of judicial review properly denied enforcement of the Board's order since petitioner was exempt as a political subdivision.**

As has been quoted heretofore from the *Randolph* decision, supra, "To the extent that it has taken into account economic realities as well as the statutory purposes, the Board's determination is entitled to great respect." (Emphasis added)

Thus, if the Board to an improper and/or inadequate extent has taken into account economic realities, as well as the statutory purposes, its determination is not entitled to great respect. It is submitted that this is what happened here.

The Court of Appeals found that the Board had not considered the "economic realities" and statutory purposes as required by *Randolph* and then proceeded to, itself, consider the "economic realities and statutory purposes" and correctly decided that the respondent utility district was a political subdivision."

This appears to be the proper standard of review in determining the political subdivision exemption, which is, in essence, a determination of jurisdiction, as well the proper standard as in other matters of "coverage" (see cases referred to in footnote 5 on page 10 of the Board's brief).

It is submitted, however, that the Board's expertise in labor relations is obviously greater there, than in the area of characterizing a political subdivision of a state. As the Court of Appeals below stated (R. 154), "The present case involves more of a question of municipal law than a labor problem."

The labor law flavor of the typical coverage question is obviously more pronounced than in the determination involved here."

It should be remembered that most of the facts in this record are undisputed, and the effect of the Board's determination is to bring the District under its jurisdiction. The Board in its brief, on page 9, and again on page 18, infers that the Court below reached its decision "on a *de novo* evaluation of the facts."

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11. Whether an individual is an "employee", *National Labor Relations Board v. Hearst Publications*, 332 U.S. 102, a "supervisor", *Local 207, International Association, et al. v. Perko*, 373 U.S. 701, an "independent contractor," *National Labor Relations Board v. E. C. Atkins*, 331 U.S. 398, or an entity is a "labor organization", *Marine Engineers Beneficial Assoc. v. Interlake Steamship Company*, 370 U.S. 173, it is submitted, are more within the realm of the Board's expertise than whether an entity is a political subdivision.

It is submitted that the Court of Appeals here reviewed the Board's determination in light of the foregoing and was completely correct in so doing.

From *National Labor Relations Board v. Highland Park Manufacturing Company*, 344 U.S. 322, the following, commencing at page 325, is quite appropriate here:

"The further contention is advanced by the Board that the administrative determination that a petitioning labor organization has complied with the Act is not subject to judicial review at the instance of an employer in an unfair labor practice proceeding. If there were dispute as to whether the C.I.O. had filed the required affidavits or whether documents filed met the statutory requirements and the Board had resolved that question in favor of the labor organizations, a different question would be presented. But here there is no question of fact. While the C.I.O. officers have since filed the affidavits, they were not on file at any time relevant to this proceeding.

It would be strange indeed if the courts were compelled to enforce without inquiry an order which could only result from proceedings that, under the admitted facts, the Board was forbidden to conduct. The Board is a statutory agency, and, when it is forbidden to investigate or entertain complaints in certain circumstances, its final order could hardly be valid. We think the contention is without merit and that an issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal."

Also as stated in *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 482 (1951), quoting from the Administrative Procedure Act, 5 U.S.C. §1010(e) (1964): "So far as necessary to decision and where presented, the reviewing [federal] court shall decide all relevant questions of law."

## VI. CONCLUSION

The Court of Appeals did consider the "economic realities" and statutory purposes (R. 151-152).

The Court of Appeals further pointed out that "it was the clear intention of Congress not to make amenable to the National Labor Relations Act employees of either federal or state governments. The effect of the order of the Board in the present case may be to extend its jurisdiction over public employees in nearly 270 utility districts in Tennessee, which districts perform a wide variety of public functions." (R. 154)

It is clear that in the Court of Appeals' opinion below, the several sentences strongly relied on by petitioner (page 7 of its brief) were not necessary to the result. The Court of Appeals' decision, when considered as a whole, can be seen to have followed the rule of the *Randolph* case. The Court of Appeals thoroughly analyzed the entire picture and reached the correct result. At most, the sentence or two at the end of the opinion below merely sets forth an additional reason for the result reached in the case.

Accordingly, it is respectfully submitted that the judgment below should be affirmed.

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The relevant provisions of the Tennessee Utility District Act of 1937, as amended (Tennessee Code, Title 6, Chapter 26, Sections 6-2601, et seq.) in addition to those listed in petitioner's brief on pp. 21-30 thereof, other relevant Tennessee statutes, North Carolina statutes, and a provision of the Tennessee Constitution are as follows:

#### **Tennessee Code**

**5-501. Organization of court.**—The county court consists of the justices of the county. It is divided into a quarterly and monthly court, the first being held by all justices or such number of the justices as is necessary to transact business, the latter by the chairman or judge of the county court. No discontinuance of process, or any matter or thing depending in said court, shall be produced by a failure to hold court at any regular session.

**5-601. Election of chairman.**—The justices of the peace of said court, a majority of all the justices of the county being present, at their first term in every year, except in counties where a county judge is provided for, shall elect a chairman, who holds his office for one (1) year and until his successor is appointed, and who presides over the deliberations of the court, and performs such other duties as now are or may be assigned him by law.

**6-318. Municipal property and services.**—Upon adoption of an annexation ordinance or upon referendum approval of an annexation resolution as hereinabove provided, an annexing municipality and any affected instrumentality of the State of Tennessee, such as, but not limited to, a utility district, sanitary district, school district, or other public service district, shall attempt to reach agreement in writing for allocation and conveyance to the annexing municipality of any or all public functions, rights, duties, property, assets and liabilities of such state instru-

mentality that justice and reason may require in the circumstances. Provided, however, that any and all agreements entered into before March 8, 1955 relating to annexation shall be preserved. The annexing municipality, if and to the extent that it may choose, shall have the exclusive right to perform or provide municipal and utility functions and services in any territory which it annexes, notwithstanding §6-2607 or any other statute, subject, however, to the provisions of this section with respect to electric cooperatives. Subject to such exclusive right any such matters upon which the respective parties are not in agreement in writing within sixty (60) days after the operative date of such annexation shall be settled by arbitration with the laws of arbitration of the state of Tennessee effective at the time of submission to the arbitrators and subsection (2) of §23-501, shall not apply to any arbitration arising under §§6-308—6-320. The award so rendered shall be transmitted to the chancery court of the county in which the annexing municipality is situated, and thereupon shall be subject to review in accordance with §§23-513—23-515 and 23-518.

If the annexed territory is then being provided with a utility service by a state instrumentality which has outstanding bonds or other obligations payable from the revenues derived from the sale of such utility service, the agreement or arbitration award referred to above shall also provide (a) that the municipality will operate the utility property in such territory and account for the revenues therefrom in such manner as not to impair the obligations of contract with reference to such bonds or other obligations, or (b) that the municipality will assume the operation of the entire utility system of such state instrumentality and the payment of such bonds or other obligations in accordance with their terms. Such agreement or

arbitration award shall fully preserve and protect the contract rights vested in the holders of such outstanding bonds or other obligations.

**6-604. Extension of utility services.**—Except as provided in §6-2608, each county, utility district, municipality or other public agency conducting any utility service specifically including water works, water plants and water distribution systems and sewage collection and treatment systems is authorized to extend such services beyond the boundaries of such county, utility district, municipality or public agency to customers desiring such service.

Any such county, utility district, municipality or other public utility agency shall establish proper charges for the services so rendered so that any such outside service shall be self-supporting.

No such county, utility district, municipality or public utility agency shall extend its services into sections of roads or streets already occupied by other public agencies rendering the same service so long as such other public agency continues to render such service.

**6-1507. Creation of board.**—Any municipality, excepting those which employ a city-manager or which have a population of less than two thousand (2,000), issuing bonds under the provisions of §§6-1501—6-1534 for the acquisition of an electric plant shall, and any municipality now or hereafter owning or operating an electric plant under §§6-1501—6-1534 or any other law may, appoint a board of public utilities (hereinafter called the "board").

The board shall be created in the following manner: At the time the governing body of a municipality issuing bonds hereunder determines that a majority of the qualified voters voting on the election resolution have assented to the bond issue for the acquisition of an electric plant.

the chief executive officer of the municipality shall, or if no such bonds are issued, or if the municipality employs a city-manager or has a population of less than two thousand (2,000), then at any time he may, with the consent of the governing body of the municipality, appoint two (2) or four (4) men from among the property holders of such municipality who are residents of the municipality and have resided therein for not less than one (1) year next preceding the date of appointment to such board. No regular compensated officer or employee of a municipality shall be eligible for such appointment until at least one (1) year after the expiration of the term of his public office.

**6-2608. Power to operate utilities.**—Any district heretofore or hereafter created under authority of this chapter is empowered to conduct, operate and maintain a system or systems for the furnishing of water, sewer, sewage disposal, natural gas, artificial gas, police, fire protection, garbage collection and garbage disposal, street lighting, parks and recreational facilities, transit facilities, transmission of industrial chemicals by pipeline to or from industries or plants located within the boundary of the district, community antenna television service, except for community antenna television service in counties having a population of more than 60,000 but less than 60,100, according to the 1960 federal census, or two (2) or more of such systems, and to carry out such purpose it shall have the power and authority to acquire, construct, reconstruct, improve, better, extend, consolidate, maintain and operate such system or systems, within or without the district, and to purchase from, and furnish, deliver and sell to any municipality, the state, any public institution and the public, generally, any of the services authorized by this chapter; provided, that with respect to the conduct and operation of a

police protection system nothing contained in this chapter shall be construed as meaning or intending any encroachment upon the police powers of the sheriff of any county in this state, but shall only empower the district to conduct and operate such police protection system when it is enabled to do so through legal arrangements with the sheriff of the county, and other constituted authorities, in a manner consistent with all provisions of the Constitution of Tennessee; and provided, further that the inclusion of the power of conducting and operating a police protection system as one of the purposes for which a district may be created, shall not in any wise affect the validity of this section the legislature hereby expressly declaring its purpose to enact the remainder of this section without the provision herein contained authorizing the conduct and operation of a police protection system if the inclusion of such provision should be held to be invalid. The term "transit facilities" shall include all real and personal property needed to provide public passenger transportation by means of trolley coach, bus, motor coach, or any combination thereof including terminal, maintenance and storage facilities. Such community antenna television service shall be limited to: (1) charging for wire or cable service only on the basis of fixed monthly charges and with no per program charges; (2) and for such wire or cable service only to programs transmitted from television stations licensed by the federal communications commission; (3) and for such wire or cable service only to programs broadcast free of charge to the entire viewing public; (4), and without altering any characteristic of the incoming signal other than its frequency and amplitude, including but not limited to altering the program content, including station breaks, by addition or deletion. Such community antenna television service shall include the right to acquire and hold such real and personal property as may be needed to ac-

complish the foregoing. Provided, however, that districts created on or after July 1, 1967, shall be empowered to furnish only those services stated in the order creating the district. Districts incorporated before July 1, 1967, shall be authorized to furnish only the services being furnished on that date, or which will be furnished by facilities to be constructed from the proceeds of bonds issued not later than July 1, 1968. Supplemental petitions for authority to furnish other services contained in this section may be addressed to the county judge or chairman of the county court, who shall give notice and hold hearings on such petitions in the same manner, on the same issues, and under the same conditions as for original incorporation.

A system or facilities for "the transmission of industrial chemicals by pipeline," as used herein shall mean and include facilities or a system used or useful in the transmission by pipeline of industrial chemicals and related commodities, in liquid, gaseous, or solid form, including raw materials, processed products, or by-products, to or from plants or industries located within the boundary of the district, on an individual basis, or in company with other plants, and to or from docks, terminals or tank farms located within or without the boundary of the district, but within the same county. Such system or facilities shall include, but not be limited to, the pipelines, docks, terminals, tank farms, compressor stations, storage and temperature treatment facilities, rights-of-way, and together with all real and personal property and equipment appurtenant to, or useful in connection with, such facilities. Before any district shall be authorized to conduct, operate or maintain such system or facilities for transmission of industrial chemicals by pipeline, as provided hereby, the board of commissioners thereof, whether previously installed in such office or nominated only, shall submit a

petition signed in their own names to the county judge or chairman of the county court in which the order approving the creation of the district was or shall be entered, whereupon the county judge or chairman shall, upon notice published as provided by §6-2604 and public hearing, determine whether or not the project so proposed will promote industry and develop trade to provide against low employment, and enter an order of the court so finding. On the issue of whether or not industry, trade and employment will be so promoted and developed, the county judge or chairman shall take into consideration the plants proposed to be served by the facilities for transmission of industrial chemicals by pipeline, but no project so proposed to be undertaken shall be found not to promote and develop industry, trade and employment for either of the following reasons: (1) that the project will provide service for a single plant; or (2) that the project will serve to maintain existing industry and employment rather than encourage new industry and additional employment. Any party in interest, including any subscriber to existing services of the district, shall have the right of appeal from said order as provided by §6-2606, but no consent to the undertaking of such district services by any number of existing subscribers shall be required, the provisions of §6-2609 notwithstanding.

Incorporated cities and towns having a population of 5,000 or over shall have the prior right as respects utility districts to extend water, sewer or other utilities in any territory within five (5) miles of their corporate limits; where an incorporated city or town has a population of less than five thousand (5,000), the limit shall be three (3) miles; provided, that this provision shall not apply within the boundaries of a utility district or to facilities heretofore extended by a utility district beyond its boundaries;

and provided, further, that a utility district may extend water, sewer or other utility facilities into such an area through agreement with the city or town concerned. A city or town shall lose its prior right under the following conditions: (1) where an agreement cannot be reached, the utility district, by a resolution setting out the area to be served and the type of utility, shall notify the city or town of its intention to serve the area; (2) after receipt of such notice, the city or town shall have sixty (60) days in which to adopt an appropriate ordinance or resolution determining to serve the area within a specified time; the utility district may within ten (10) days appeal to the county judge or chairman of the county court of the county in which the major part of the land area is located if it considers the time so determined is too long, whereupon the county judge or chairman after hearing both parties shall determine a reasonable time for the city or town to provide the services, and further appeal may be taken by either party as provided in §6-2606 and (3) upon failure of the city or town to provide the services within the time so determined, the utility district shall be authorized to serve any part of the area not already served by the city or town.

Section 6-2619, authorizing the issuance of revenue bonds for the purpose of constructing, acquiring, reconstructing, improving, bettering or extending any facility or system authorized by this chapter, being "The Utility District Law of 1937," is hereby made applicable to any district undertaking to exercise the power conferred by this section to conduct, operate and maintain a system or facilities for the transmission of industrial chemicals by pipeline.

**6-2612. General implementing powers.**—Any district created pursuant to the provisions of this chapter shall be

vested with all the powers necessary and requisite for the accomplishment of the purpose for which such district is created, capable of being delegated by the legislature. No enumeration of particular powers herein created shall be construed to impair or limit any general grant of power herein contained nor to limit any such grant to a power or powers of the same class or classes as those enumerated. The district is empowered to do all acts necessary, proper or convenient in the exercise of the powers granted herein.

**6-2617. Publication of annual statement.**—Within ninety (90) days after the close of the fiscal year of each district organized and operating under the provisions of this law, the commissioners of the district shall publish in a newspaper of general circulation, published in the county in which the district is situated, a statement showing (a) the financial condition of the district at the end of the fiscal year; (b) the earnings of the district during the fiscal year just ended; (c) a statement of the water rates then being charged by the district, and a brief statement of the method used in arriving at such rates.

In addition to the requirements listed in the first paragraph, the annual audit shall show the outstanding indebtedness of the district, the date contracted, the rate of interest paid and purpose for which issued, and the date of maturity thereof. A copy of such annual statement or audit shall be filed with the county judge or judges where publication is required in accordance with this section and §6-2635, and a copy forwarded to the office of the controller of the treasury of the state of Tennessee within thirty (30) days from the date of such publication. The failure to file such copies shall be a misdemeanor.

**8-3811. Payments by political subdivisions.**—Each political subdivision as to which a plan has been approved under §§8-3808—8-3810 shall pay into the contribution

fund, with respect to wages (as defined in §B-3801), at such time or times as the state agency may by regulation prescribe, contributions in the amounts and at the rates specified in the applicable agreement entered into by the state agency under §B-3803.

Any other provision of law to the contrary notwithstanding, amounts equal to the taxes under the Federal Insurance Contributions Act payable by the employer in behalf of class A members for the period beginning January 1, 1956, and ending June 30, 1961, shall be paid from any unexpended amounts heretofore or hereafter appropriated or otherwise made available for the Tennessee state retirement system for such period. This provision shall not be extended or otherwise be deemed effective with respect to such appropriations or other amounts for any period subsequent to June 30, 1961.

**9-1202. Definition of terms.—\* \* \***

(a) The term "municipality" shall mean any county city, town, township, utility district, and sanitary district of this state;

**Tennessee Private Acts of 1963, Chapter 8**

**SECTION 4.** Be it further enacted, That such Board shall consist of seven members appointed by the Mayor of said Municipality and approved by its Board of Aldermen. Two of the appointees shall be residents of Municipality, qualified as provided in TCA 6-1507 et seq, as amended. Four of the appointees shall own property and reside outside the corporate limits of Municipality, shall be electric consumers of the consolidated electric system and otherwise shall be qualified as provided in the aforesaid TCA 6-1507 et seq, as amended. The initial terms of these initial six appointees shall be as follows: Two shall serve for

one year; two shall serve for two years; and two shall serve for three years. Succeeding appointees shall serve three year terms. Any appointee may be appointed to successive terms. The seventh member of the Board shall be an Alderman of Municipality, whose term of office shall be fixed by the Mayor, but shall not extend beyond his term as alderman.

#### **General Statutes of North Carolina**

**§ 117-13. Board of directors; compensation; president and secretary.**—Each corporation formed hereunder shall have a board of directors and the powers of a corporation shall be vested in and exercised by a majority of the directors in office. The directors of the corporation, other than those named in its certificate of incorporation, shall be elected annually by the members entitled to vote, but if the bylaws so provide the directors may be elected on a staggered term basis: Provided, that the total number of directors on a board shall be so divided that not less than one third of them, or as nearly thereto as their division for that purpose will permit, shall be elected annually, and no term shall be longer than for three years; and provided further that, except as may be necessary in inaugurating such a plan, all directors shall be elected for terms of equal duration. The directors must be members and shall be entitled to receive for their services only such compensation as is provided in the bylaws: Provided, that such compensation shall not exceed twenty dollars (\$20.00) for each day of their attendance at meetings for which their attendance has been duly authorized. The board shall elect annually from its own number a president and a secretary.

**§ 117-16. Corporate purpose, terms and conditions of membership.**—The corporate purpose of each corporation formed hereunder shall be to render service to its mem-

bers only, and no person shall become or remain a member unless such person shall use energy supplied by such corporation and shall have complied with the terms and conditions in respect to membership contained in the by-laws of such corporation: Provided, that such terms and conditions of membership shall be reasonable; and provided further, that no bona fide applicant for membership, who is able and willing to satisfy and abide by all such terms and conditions of membership, shall be denied arbitrarily, or capriciously, or without good cause.

**§ 117-18. Specific grant of powers.**—Subject only to the Constitution of the State, a corporation created under the provisions of this article shall have power to do any and all acts or things necessary or convenient for carrying out the purpose for which it was formed, including, but not limited to:

- (6) The right to apply to the North Carolina Rural Electrification Authority for permission to construct or place any parts of its system or lines in and along any State highway or over any lands which are now, or may be, the property of this State, or any political subdivision thereof. In all questions involving the right of way, or the right of eminent domain, the rulings of the North Carolina Electrification Authority shall be final.

#### **Constitution of the State of Tennessee, Article 6**

**Sec. 15. Districts in counties—Justices and constables—Number—Term—Removal from district.**—The different Counties of this State shall be laid off, as the General Assembly may direct, into districts of convenient size, so that the whole number in each County shall not be more than twenty-five, or four for every one hundred square miles. There shall be two Justices of the Peace and one

Constable elected in each district by the qualified voters therein, except districts including County towns, which shall elect three Justices and two Constables. The jurisdiction of said officers shall be co-extensive with the County. Justices of the Peace shall be elected for the term of six, and Constables for the term of two years. Upon the removal of either of said officers from the district in which he was elected, his office shall become vacant from the time of such removal. Justices of the Peace shall be commissioned by the Governor. The Legislature shall have power to provide for the appointment of an additional number of Justices of the Peace in incorporated towns.



FILE COPY

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APR 1

No. 785

CONFIDENTIAL

IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1970

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

THE NATURAL GAS UTILITY DISTRICT OF HAWKINS  
COUNTY, TENN., Respondent

BRIEF AMICUS CURIAE ON BEHALF OF THE  
AMERICAN PUBLIC GAS ASSOCIATION

CHARLES F. WHEATLEY, JR.,  
General Counsel

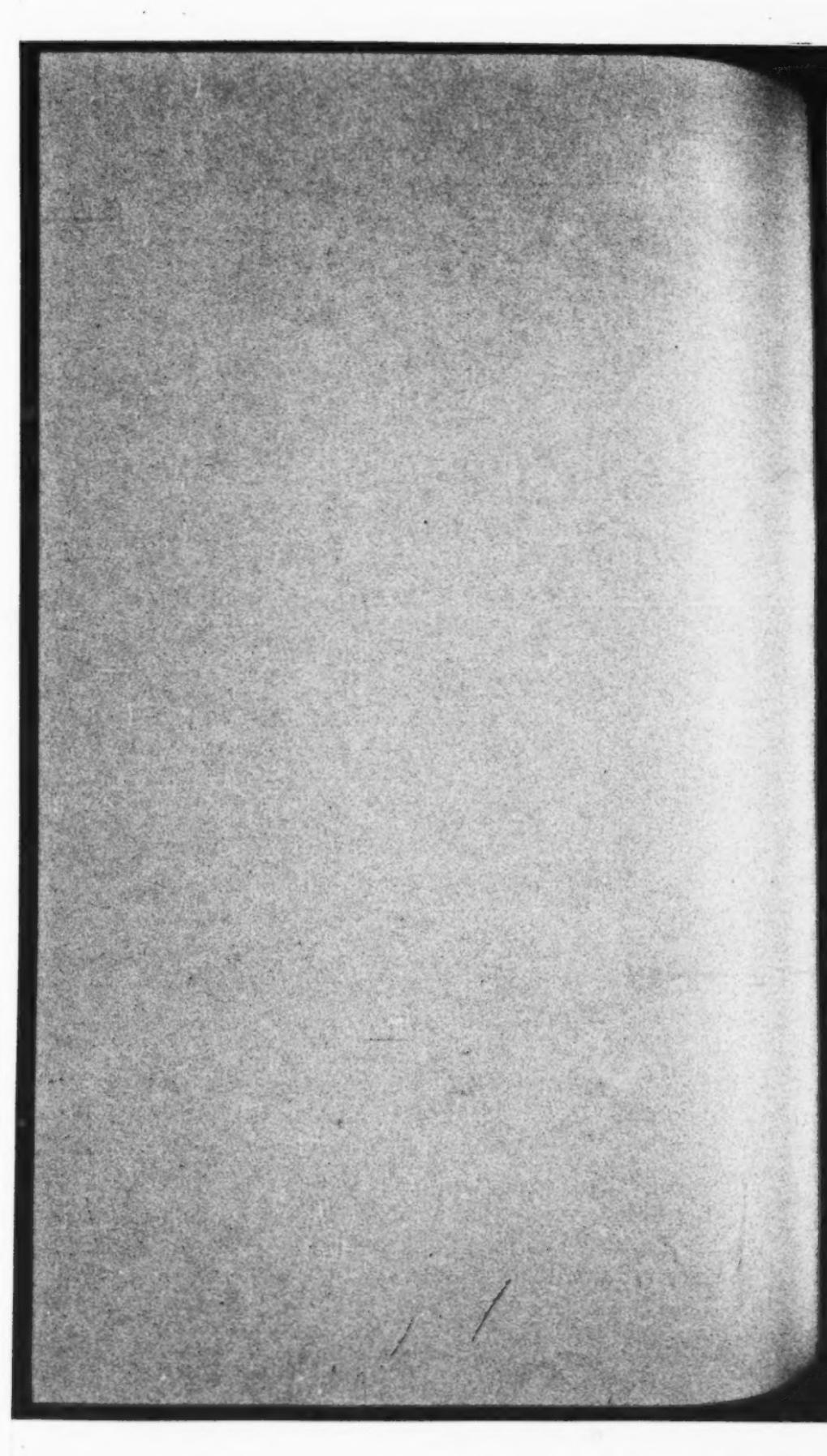
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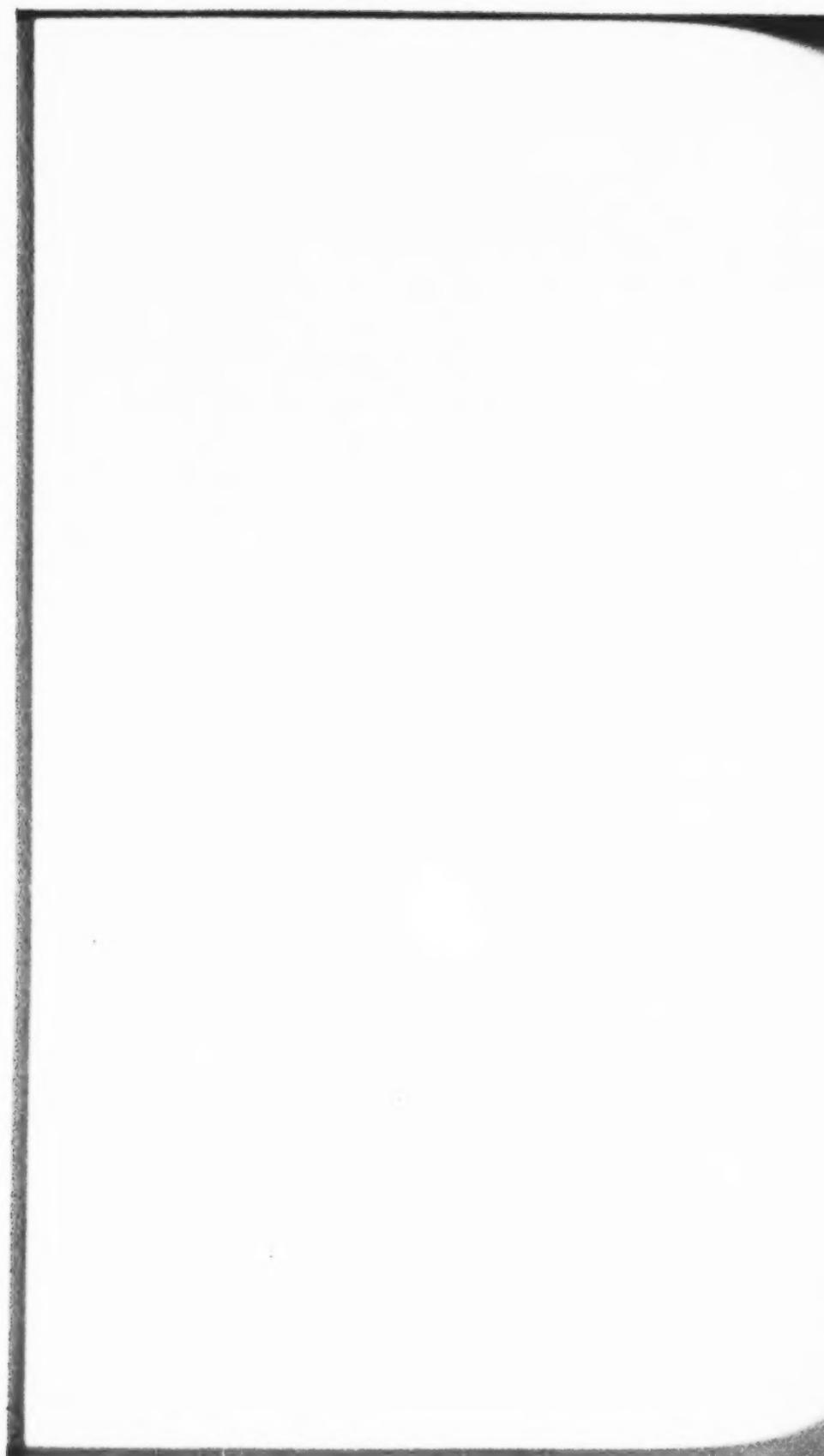
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1970

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No. 785

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NATIONAL LABOR RELATIONS BOARD, *Petitioner*  
v.  
THE NATURAL GAS UTILITY DISTRICT OF HAWKINS  
COUNTY, TENN., *Respondent*

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BRIEF AMICUS CURIAE ON BEHALF OF THE  
AMERICAN PUBLIC GAS ASSOCIATION

---

Pursuant to Rule 42(4) of the Revised Rules of the Supreme Court of the United States, the American Public Gas Association, representing the interests of over 200 local public gas distribution systems located throughout the United States, all political subdivisions of their respective states, submits this Brief Amicus Curiae in support of the Respondent, the Natural Gas Utility District of Hawkins County, Tennessee, seeking affirmance of the decision of the United States

Court of Appeals for the Sixth Circuit in *National Labor Relations Board v. Natural Gas Utility District of Hawkins County, Tennessee*, 427 F. 2d 312 (6th Cir., 1970). The Solicitor General on behalf of the Petitioner and attorneys for the Respondent have consented to the filing of this brief.

#### INTEREST OF AMICUS CURIAE

The American Public Gas Association is a nonprofit organization representing more than 200 local public gas systems located in 28 States.<sup>1</sup> The Association consists primarily of municipal gas systems, but also includes public utility districts, county districts and other public agencies having gas facilities. In size the systems range from a few large cities to many small municipal systems serving a few hundred residents in a town or village. For the most part, public gas systems serve smaller communities where, but for the public system, there would be no natural gas service in the community. The 937 public gas systems serve approximately 7 percent of the total natural gas customers in the United States.

Through the Association these local public gas systems have a voice in national policies affecting their operations. Reversal of the decision of the United States Court of Appeals for the Sixth Circuit would disturb a national policy which vitally affects the operations of local public gas systems. A reversal would give license to government agencies to disregard the definitive statements of a state court regarding the nature of its political subdivisions and to determine the status of such subdivisions *de novo*, thereby placing in

<sup>1</sup> There are currently operating in the United States 937 public gas systems (American Public Gas Association 1969 Directory).

jeopardy numerous exemptions and preferences contained in federal statutes which are necessary for the optimum development and operation of these systems and which are dependent upon recognition of the status of such systems as political subdivisions, all to the prejudice and detriment of the Association's members.

#### **ARGUMENT**

I. Congress intended that determinations of whether an entity is a "political subdivision" of a state within the meaning of section 2(2) of the National Labor Relations Act should be made in accordance with the characterizations made by the highest court of a state unless unreasonable, discriminatory, or otherwise inconsistent with the broad purposes of the Act.

Section 2(2) of the National Labor Relations Act provides that the term "employer" shall not include "any state or political subdivision thereof". Although the term "political subdivision" is not defined in the Act and the legislative history is silent on the matter, this exemption from the Act's coverage, like similar exemptions in other social legislation of the period,<sup>2</sup> was obviously designed with paramount regard to the delicate policy questions involved in applying such legislation to state and local governmental entities. This Court has made it clear in various contexts that "how power shall be distributed by a state among its governmental organs is commonly, if not always, a

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<sup>2</sup> E.g., the Public Utility Holding Company Act of 1935 exempts "the United States, a State, or any political subdivision of a State" from the regulatory authority of the Securities and Exchange Commission and the Federal Power Commission, 15 U.S.C. § 79b, 16 U.S.C. § 824; the Fair Labor Standards Act of 1938 exempts "the United States or any State or political subdivision of a State", 29 U.S.C. § 203(d); the Social Security Act excludes "service performed in the employ of a State, or any political subdivision thereof", 26 U.S.C. § 3121(b)(7).

question for the state itself." *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937). Consequently it is reasonable to assume that Congress was aware that such questions were peculiarly a matter for state law to which deference would be paid in interpreting the section. It would be unreasonable to conclude that Congress intended the question of an entity's status to be decided *de novo* where the highest court of a state had already addressed itself to the matter.

The Board erroneously poses the issue as whether federal or state law shall "govern" the interpretation of section 2(2). Obviously the matter is the proper interpretation of federal law. The court below concluded that the characterization of gas utility districts as "municipalities" by the Tennessee legislature and as "arms or instrumentalities" of the state by the Supreme Court of Tennessee ought to be controlling. The Board disagrees, contending that "although a state has a vital interest in defining its political subdivisions and a special competence to do so" (Br. 13), this Court's decision in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), mandates the development of an independent federal definition by the Board which need not defer to state court characterizations.

The weight attributed to *Hearst* as a basis for ignoring the Tennessee Supreme Court's characterization is too far reaching. Simply because the National Labor Relations Act established a national labor policy does not, *ipso facto*, compel the conclusion that Congress intended state law to be superseded concerning the peculiarly local question of what constitutes a political subdivision. This Court was faced with a similar contention by the United States with respect to the rule to be followed in interpreting "real property"

under the Reconstruction Finance Corporation Act in *RFC v. Beaver County*, 328 U.S. 204 (1946), decided after the *Hearst* case, and dealt with that argument as follows (*Id.* at 209-10) :

"In support of its contention that a federal definition of real property should be applied, the government relies on the generally accepted principle that Congress normally intends that its laws shall operate uniformly throughout the nation so that the federal program will remain unimpaired. . . . But Congress in permitting local taxation of the real property, made it impossible to apply the law with uniform tax consequences in each state and locality. For the several states, and even the localities within them, have diverse methods of assessment, collection, and refunding. Tax rates vary widely. To all of these variable tax consequences Congress has expressly subjected the "real property" of the Defense Plant Corporation. In view of this express provision the normal assumption that Congress intends its law to have the same consequences throughout the nation cannot be made.

\* \* \*

We think the Congressional purpose can best be accomplished by application of settled state rules as to what constitutes "real property" so long as it is plain, as it is here, that the state rules do not effect a discrimination against the government, or patently run counter to the terms of the Act."

The foregoing rationale is equally applicable to the definition of "political subdivisions" in the National Labor Relations Act. Nothing in the Act or this Court's decision in *Hearst* compels the conclusion reached by the Board. The characterization by a state's highest court as to the nature of one of its public bodies is a matter of peculiar state concern, wholly

unless the complex questions of employer-employee relationships involved in *Heast*. While the Board's expertise and the need for a uniform national labor policy would justify a conclusion contrary to state law concerning the kind of employment relationships covered by the Act, the situation here is wholly dissimilar. Respondent is admittedly an employee. Whether it is also a political subdivision does not turn on matters peculiarly within the Board's competence, nor should it.<sup>4</sup> Moreover, the *Heast* decision did not foreclose the application of state law as a matter of federal law in interpreting other provisions of the National Labor Relations Act. Where, as here, Congress has not expressed itself definitively on a matter treated in the Act, "there is no reason to reject the characterization that state law would impose unless that characterization is unreasonable or otherwise inconsistent with national labor policy." *International Union v. Hoosier Cardinal Corp.*, 383 U.S. 696, 706 (1966).<sup>5</sup>

The court below properly applied the *Heast* County and *Hoosier Cardinal* tests. There was no allegation by the Board, nor could there be, that the Tennessee Supreme Court's characterization was either discriminatory, unreasonable, or patently counter to the policy

<sup>4</sup> For the same reasons the Board's assertion that the court below "should have accepted the Board's considered judgment on this matter" (Br. 9) is without merit. NLRB v. Brown, 386 U.S. 278 (1965).

<sup>5</sup> The cases cited by the Board relating to the anti-strike provisions of state law and their applicability to certain categories of workers (Br. 10, 12-13) lend no support to its contentions. Those cases, like *Heast*, went to the nature of the employment relationship between a government entity (concededly within the exemption) and certain workers, not to the question of whether a particular entity was in fact a "political subdivision" of a state, a patently different issue.

of the Act. The fact that the state court's decision was rendered in a context unrelated to labor problems does not detract from its validity, as the Board suggests.<sup>8</sup> Rather it provided an objective setting assuring that it was not hampered down with any design to frustrate or circumvent the purposes of the National Labor Relations Act. The conclusion of the court below that the Tennessee Supreme Court's characterization was "binding" on the Board must be read in that context.

**II. The interpretation of section 2(2) applied by the court below accords with the Board's administrative construction of the Act for over 25 years.**

With the single exception of the distinguishable line of cases relating to cooperatives,<sup>9</sup> the Board, until its decision in *Hawkins*, had employed the following procedure in ascertaining whether the entity involved was a political subdivision and thereby entitled to receive an exemption:

- (a) If a state court characterized the subject entity as not being a political subdivision,<sup>10</sup> or as being properly considered a political subdivision,<sup>11</sup> or as possessing the characteristics which are usually associated

<sup>8</sup> Indeed, a state court is unlikely to ever have the precise question at issue here presented to it, since it can only arise in the context of an NLRB proceeding. Nor can the Board's suggestion (Br. 14, n 8-9) that a state can or would apply such characterization arbitrarily be supported.

<sup>9</sup> See pp. 8-10, *infra*.

<sup>10</sup> *Tahoe-Carson Irrigation District*, 164 N.L.R.B. 1176 (1967).

<sup>11</sup> *New Bedford Woods Hole, Martha's Vineyard*, 127 N.L.R.B. 1822, 1824-25 (1960); *Southeastern Alabama Gas District, Andalusia, Alabama*, N.L.R.B. Case No. 15 RC-3493 (1966); *Marshall County Gas District*, N.L.R.B. Case No. 10 RC-7832 (1969).

with political subdivisions,<sup>9</sup> the court's decision was given controlling weight;

(b) in the absence of a definitive state court decision on the subject, the Board undertook a *de novo* determination<sup>10</sup> of whether the subject entity possessed the characteristics of a political subdivision, giving careful consideration, although not binding effect, to the following sources of information, where available:

(i) the pronouncements of lower eschelon legal or administrative officers, e.g., the State's attorney general, or the State's labor board;<sup>11</sup>

(ii) statutory characterization.<sup>12</sup>

This consistent practice was departed from in *Randolph Electric Membership Corporation*, 145 N.L.R.B. 158 (1963), where the Board, after having consistently asserted jurisdiction over various kinds of private co-

<sup>9</sup> International Brotherhood of Electrical Workers, 87 NLRB 99, 100 (1949). Kentucky courts did not characterize boards of education as "political subdivisions" but rather they held that they exercised a state function, were composed of state officers, and held state property. The Board recognized that courts in other states had declared entities possessing these characteristics as being political subdivisions and held that the entity involved should also be so characterized.

<sup>10</sup> Virginia Pilot Ass'n, 159 N.L.R.B. 1733 (1966); Local Joint Executive Board, 153 N.L.R.B. 392, 396-97 (1965); Middle Dept. Ass'n of Fire Underwriters, 122 N.L.R.B. 1115 (1959); Woods Hole, *supra* note 8 at 1324-1326; Oxnard Harbor District, 34 N.L.R.B. 1285, 1289-90 (1941).

<sup>11</sup> Woods Hole, *supra* note 8 at 1325-26 (labor board decisions); Randolph Electric Membership Corp., 145 N.L.R.B. 158 (1963) (attorney general's decision).

<sup>12</sup> Randolph Electric Membership Corp., *supra* note 11; Woods Hole, *supra* note 8 at 1326; Mobile Steamship Ass'n, 8 N.L.R.B. 1297 (1938).

operatives since 1947, was faced with a situation in which the North Carolina legislature and the state's attorney general had characterized electric membership corporations as "public agencies" having, within certain limits, "the same rights as any other political subdivision of the State." 145 N.L.R.B. 158, 161 (1963). There was no decision on the matter by any North Carolina court. In that case, applying a test which departed from its previous criteria, the Board concluded that the characterizations by the state's legislature and attorney general were not conclusive of the question. Its order was affirmed by the Fourth Circuit. *NLRB v. Randolph Electric Membership Corp.*, 343 F.2d 60 (1965).

The decisions of the Board and the Fourth Circuit in *Randolph* are consistent with the rationale of the court below in that it seems clear that Congress did not intend to include private electric cooperatives as "political subdivisions" of a state. Congress has traditionally recognized the distinction between private cooperatives and public governmental agencies. This is most evident in the many statutes providing for preference to public agencies and cooperatives in the sale of power from federal installations.<sup>13</sup> Similarly, in 1935 the electric cooperative movement was just underway and it appears unlikely that Congress in developing the

<sup>13</sup> E.g., preference in the sale of federal power is given to "public bodies and cooperatives" by the Bonneville Power Act of 1937 (16 U.S.C. § 832e), the Fork Peck Project Act of 1938 (16 U.S.C. § 833e), and the Flood Control Act of 1944 (16 U.S.C. § 825s); to "municipalities and other public corporations or agencies; and also to cooperatives and other non-profit organizations" by the Reclamation Project Act of 1939 (43 U.S.C. § 485h) and the Water Conservation and Utilization Act of 1939 (16 U.S.C. § 590z-7).

National Labor Relations Act considered these budding private, non-profit institutions as "political subdivisions of a state." Indeed, for these same reasons it has been held that electric cooperatives are not within the exemption from Federal Power Commission jurisdiction provided governmental instrumentalities in the Public Utility Holding Company Act, enacted in the same Congress as the National Labor Relations Act. *City of Paris v. FPC*, 394 F.2d 983 (D.C. Cir. 1968). This being so, the *Randolph* decision may be sustained either as clearly consistent with Congressional intent or as setting aside an "unreasonable" state characterization in light of the general treatment of electric cooperatives as private entities by most states and Congress.

**III. The Board's "independent test" as to whether respondent is a "political subdivision" departs from the criteria previously applied by the Board and inaugurates a functional test long discarded as a valid test of "governmental" activity.**

The Board's decision in *Hawkins County* is in error not only in disregarding its established administrative practice which properly accorded controlling weight to state court decisions, but also in error in that it disregards those common elements of the cases in which it made a *de novo* determination of the question of whether an entity was in fact a political subdivision which it considered determinative of the question. For example, in *Oxnard Harbor District* (34 N.L.R.B. 1285 (1941)):

- (a) the district is formed by petition of 50 or more voters in the area proposed for the district;
- (b) those voters by election select three persons to serve as harbor commissioners;

(c) the County Board of Supervisors (an arm of the State) passes on the feasibility of the district, the legitimacy of the election and if the decision is favorable grants the petition thus creating the district. This district was held by the Board to possess the characteristics which it consistently applies as indicative of a political subdivision, namely that the entity must have been created directly by the State, or be administered by State appointed or publicly elected individuals.<sup>14</sup>

*In Hawkins County:*

- (a) the district is formed by petition of property owners (analogous to voters);
- (b) the county judge, a publicly elected official and arm of the state, determines whether the district is feasible;
- (c) the commissioners of the district are either appointed by a publicly elected official (the same county judge) or are elected by the qualified voters of the district (R. 86,125) and the same public official fills vacancies if the commissioners cannot agree on a replacement.

Applying the criteria stated by the Board the distinctions between *Oxnard* and *Hawkins* are more apparent than real and the error of the Board in the *Hawkins* decision becomes obvious.

Clearly erroneous, moreover, is the Board's reliance on the gas utility function performed by the respondent as a primary reason for concluding that it is not

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<sup>14</sup> E.g., Virginia Pilot Ass'n, 159 N.L.R.B. 1733 (1966); Local Joint Executive Board, 153 N.L.R.B. 392, 397 (1965); Randolph Electric Membership Corp., 145 N.L.R.B. 158 (1963).

a political subdivision (Pet. for Cert., App. C, pp. 37-38) :

"Furthermore, its operations and services do not differ significantly from those of enterprises in private industry including utilities whose employees are entitled to the benefits of the Act."

This test resurrects the long abandoned distinction between "governmental" and "proprietary" functions as a test for the appropriateness of governmental immunity. This distinction was laid to rest in the inter-governmental tax immunity field by this Court in *New York v. United States*, 326 U.S. 572 (1946), where it was rejected by all three opinions in that case. The rationale for its rejection was most pointedly stated by Justices Douglas and Black (*Id.* at 591) :

" . . . A State's project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise, or conducted for profit. Cf. *Helvering v. Gerhardt*, 304 U.S. 405, 426, 427. A State may deem it as essential to its economy that it own and operate a railroad, a mill, or an irrigation system, as it does to own and operate bridges, street lights, or a sewage disposal plant. What might have been viewed in an early day as an improvident or even dangerous extension of state activities may today be deemed indispensable. But as Mr. Justice White said in his dissent in *South Carolina v. United States*, any activity in which a state engages within the limits of its police power is a legitimate governmental activity. Here a State is disposing of some of its natural resources. Tomorrow it may issue securities, sell power from its public power project, or manufacture fertilizer. Each is an exercise of its power of sovereignty."

There are over 900 publicly owned gas utilities and 2,000 publicly owned electric utilities<sup>15</sup> in the nation. The implications of the Board's contention pose a serious threat to the exemption it was assumed Congress had provided for them in section 2(2). If state law is to be ignored in determining whether they are "political subdivisions" and replaced by the Board's "independent test" keyed to whether the entity in question is performing a function traditionally in the realm of private enterprise, the Congressional exemption will have been rendered meaningless to thousands of governmental utilities.

**IV. The Board's decision jeopardizes the status of political subdivisions under numerous federal statutes granting preferential treatment or regulatory exemptions to such subdivisions.**

If this Court sanctions the Board's disregard of the determination of a state court that a certain entity is a political subdivision a reverse domino effect could result. Other government agencies which had hitherto accepted state court characterizations and granted statutory preferences or exemption based upon such characterizations would feel free to disregard that characterization thereby jeopardizing long established and relied on preferences and exemptions. Some of the preferences conceivably affected are:

**A. Preferences to political subdivisions in the development of and benefits flowing from the nation's water power resources.**

Congress has over a period of many years recognized that the furnishing of electric power to its citizens is a legitimate activity of states and their political sub-

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<sup>15</sup> 1969 Directory, American Public Gas Association; Annual Directory, 1971, American Public Power Association.

divisions and that it is directly related to public health, safety and welfare. Indeed, it has fostered and encouraged states and other public bodies to engage in the distribution of electric power to citizens by provisions in the law granting preferences to them in the purchase of electric power generated at Federal projects<sup>16</sup> and in the non-federal development of hydro power resources.<sup>17</sup>

#### **B. Exemptions from coverage by the federal income tax laws.**

Federal taxation of utility districts analogous to Hawkins County would work a severe disruption of established state and municipal fiscal systems. The respondent Hawkins County Public Utility District,

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<sup>16</sup> (1) Boulder Canyon Project Act, § 5, 43 U.S.C. § 617d(e) (in case of conflicting applications re contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or sale of energy, preferences granted to State or political subdivision).

(2) Tennessee Valley Authority Act, 16 U.S.C. §§ 831i, j (preference in sale and distribution of surplus power to States, counties, municipalities is construed to include "public agencies" of any of them).

(3) Rural Electrification Act, 7 U.S.C. § 904 (preferences in federal loans for electric plants and transmission lines to "subdivisions and agencies" of States).

(4) Bonneville Project Act, 16 U.S.C. §§ 832b, c (preferences in the distribution of electricity to "public bodies" including agencies or subdivisions of States, counties and municipalities). Same coverage: Fort Peck Project Act, 16 U.S.C. § 833e. § 833e.

(5) Reclamation Project Act of 1939, 43 U.S.C. § 485 (preference in the sale of electric power or lease of power privileges shall be given "to municipalities and other public corporations or agencies.") Same coverage: Water Conservation and Utilization Act, 16 U.S.C. § 590z-7.

<sup>17</sup> Federal Power Act, § 7, 16 U.S.C. § 800 (preference in applications re hydro projects to States and municipalities,—municipality is defined as including political subdivisions).

similar to other public systems, has issued tax exempt bonds for its facilities and is exempt from Federal income tax.<sup>18</sup> The overwhelming majority of public gas systems are organized to serve, are owned or are controlled by small communities and utility districts. This phenomenon of concentration of public power in small communities and districts where often the private power companies would not venture for lack of a sizeable market, indicates that care should be taken not to endorse any agency action that would endanger either these systems' power source or the revenues therefrom. The long-established national policies expressed in the Internal Revenue Code and uniformly applied to exempt Hawkins County and other public gas districts in the past are necessary to the continued operation of such systems to serve their communities.

**C. Exemptions from federal regulatory and social welfare programs.**

If the Board's rationale is sustained, substantially similar exemptions for political subdivisions under a host of other federal statutes (*see, e.g.,* note 2, *supra*) will become fair game for all other federal agencies. Although the Board seeks to disclaim any intent to have its views affect similar exemptions under other federal laws (Br. 15, n. 10), the adverse impact in those other areas is inevitable. Long-established relationships between the Federal Government and local subdivisions under many Federal statutes could be sub-

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<sup>18</sup> (1) Internal Revenue Code, 26 U.S.C. § 103(a) (gross income does not include interest on—(1) the obligations of a State . . . or any political subdivision of . . . the foregoing . . .).

(2) Internal Revenue Code, 26 U.S.C. § 115 (gross income does not include—(1) income derived from any public utility or the exercise of any essential governmental function and accruing to a State or Territory, or any political subdivision thereof . . .").

ject to question or litigation creating an era of doubt and uncertainty that could hinder the conduct of vital public activities at the local level.

#### **CONCLUSION**

For each and all of the reasons stated above, the American Public Gas Association, as Amicus Curiae on behalf of the local public gas distribution systems it represents, respectfully requests that the Supreme Court of the United States grant the relief requested by the Respondents in this proceedings, and affirm the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

**CHARLES F. WHEATLEY, JR.,  
General Counsel**

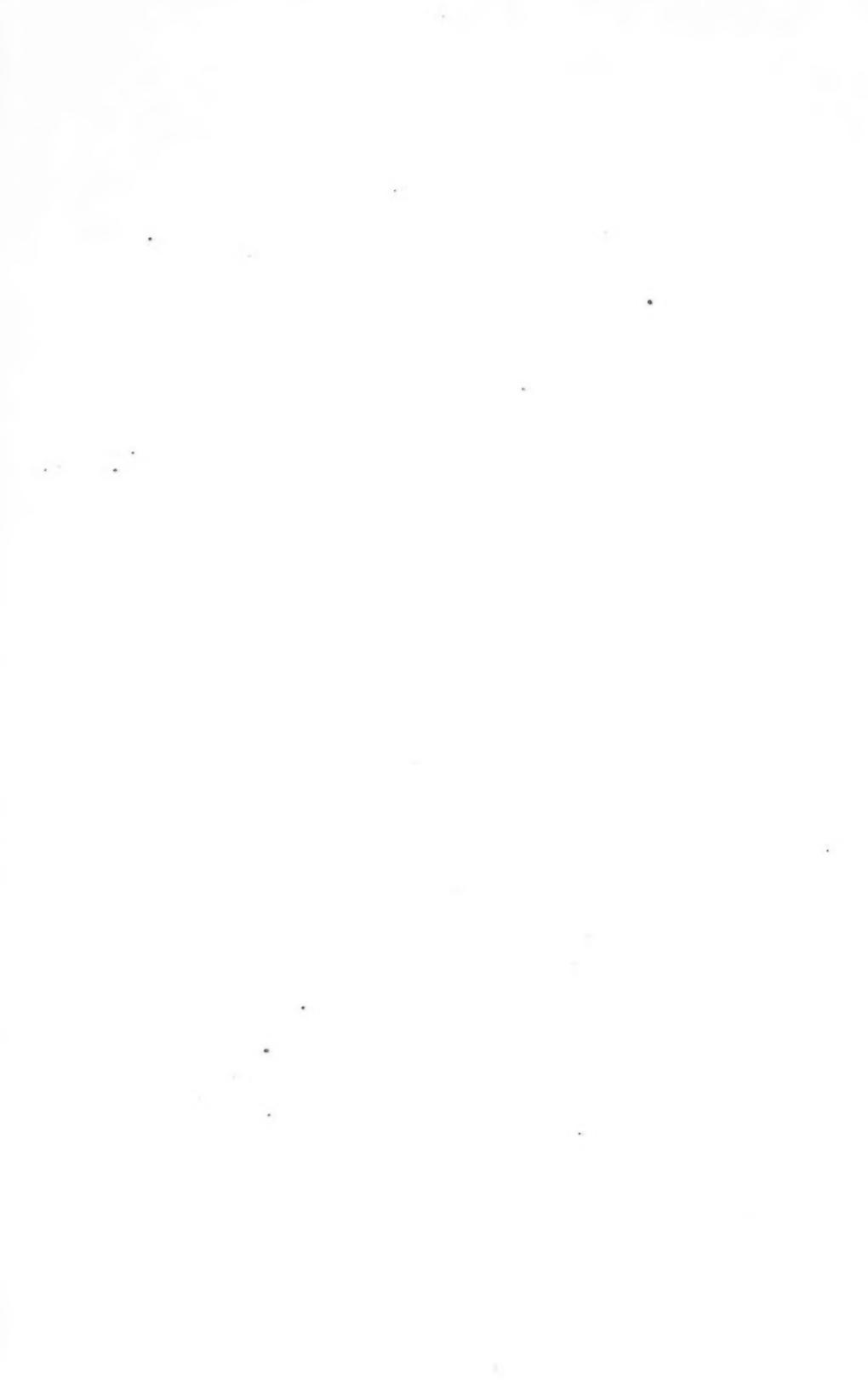
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NOTE : Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

## Syllabus

### NATIONAL LABOR RELATIONS BOARD *v.* NATURAL GAS UTILITY DISTRICT OF HAWKINS COUNTY, TENNESSEE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE SIXTH CIRCUIT

No. 785. Argued April 20, 1971.—Decided June 1, 1971

In this unfair labor practice proceeding under the Labor Management Relations Act respondent contended that it was not an "employer" but came within the "political subdivision" exemption in § 2 (2) of the Act. The National Labor Relations Board (NLRB) had found that respondent met neither of the tests to which it held that exemption was limited, *viz.*, entities that are either (1) created directly by the State, so as to constitute governmental departments or administrative arms, or (2) administered by individuals who are responsible to public officials or the general electorate. The Court of Appeals upheld respondent's contention, viewing as controlling a Tennessee Supreme Court decision construing the State's Utility District Law under which respondent had been organized. A District organized under that statute is a "municipality" or public corporation," has eminent domain powers, is exempt from state, county, or municipal taxation, and income from its bonds is exempt from federal income tax. The officers who conduct the District's business receive nominal compensation, are appointed by a public official, and are subject to removal by statutory procedures applicable to public officials.  
*Held:*

1. Federal, rather than state, law governs the determination whether an entity is a "political subdivision" of a State within the meaning of § 2 (2) of the Labor Management Relations Act. *NLRB v. Randolph Electric Membership Corp.*, 343 F. 2d 60. Pp. 2-4.

2. While the NLRB's construction of the statutory term is entitled to great respect, there is no "warrant in the record" and

**Syllabus**

"no reasonable basis in law" for the NLRB's conclusion that respondent was not a political subdivision. In the light of all the factors present here, including the fact that the District is administered by individuals who are responsible to public officials (thus meeting even one of the tests used by the NLRB), respondent comes within the coverage of that statutory exemption. Pp. 4-9.

427 F. 2d 312, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, DOUGLAS, HARLAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. STEWART, J., filed a dissenting opinion.

**NOTICE:** This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

## SUPREME COURT OF THE UNITED STATES

No. 785.—OCTOBER TERM, 1970

National Labor Relations Board,  
Petitioner,  
*v.*  
The Natural Gas Utility District  
of Hawkins County,  
Tennessee.

On Writ of Certiorari  
to the United States  
Court of Appeals for  
the Sixth Circuit.

[June 1, 1971]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Upon the petition of Plumbers and Steamfitters Local 102, the National Labor Relations Board ordered that a representation election be held among the pipefitters employed by respondent, Natural Gas Utility District of Hawkins County, Tennessee, 167 N. L. R. B. 691 (1967). In the representation proceeding, respondent objected to the Board's jurisdiction on the sole ground that as a "political subdivision" of Tennessee, it was not an "employer" subject to Board jurisdiction under § 2 (2) of the Labor Management Relations Act, 29 U. S. C. § 152 (2).<sup>1</sup> When the Union won the election and was

<sup>1</sup> Section 2 (2) of the LMRA, 29 U. S. C. § 152 (2) provides:

"The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

certified by the Board as bargaining representative of the pipefitters, respondent refused to comply with the Board's certification and recognize and bargain with the Union. An unfair labor practice proceeding resulted and the Board entered a cease-and-desist order against respondent on findings that respondent was in violation of §§ 8 (a)(1) and 8 (a)(5) of the Act. 29 U. S. C. §§ 158 (a) 1 and 158 (a) 5. 170 N. L. R. B. No. 156 (1968). Respondent continued its noncompliance and the Board sought enforcement of the order in the Court of Appeals for the Sixth Circuit. Enforcement was refused, the court holding that respondent was a "political subdivision," as contended. 427 F. 2d 312 (1970). We granted certiorari, 400 U. S. 990 (1971). We affirm.

The respondent was organized under Tennessee's Utility District Law of 1937, Tenn. Code Ann. §§ 6-2601-6-2627 (1955). In *First Suburban Water Utility District v. McCanless*, 177 Tenn. 128, 146 S. W. 2d 948 (1941), the Tennessee Supreme Court held that a utility district organized under this Act was an operation for a state governmental or public purpose. The Court of Appeals held that this decision "was of controlling importance on the question whether the District was a political subdivision of the state" within § 2 (2) and "was binding on the Board." 427 F. 2d, at 315. The Board, on the other hand, had held that "while such State law declarations and interpretations are given careful consideration . . . , they are not necessarily controlling." 167 N. L. R. B., at 691. We disagree with the Court of Appeals and agree with the Board. Federal rather than state law governs the determination, under § 2 (2), whether an entity created under state law is a "political subdivision" of the State and therefore not an "employer" subject to the Act.<sup>2</sup>

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<sup>2</sup> Respondent agrees in its brief in this Court, page 13, that state law is not controlling.

The Court of Appeals of the Fourth Circuit dealt with this question in *NLRB v. Randolph Electric Membership Corporation*, 343 F. 2d 60 (1965), where the Board had determined that Randolph Electric was not a "political subdivision" within § 2 (2). We adopt as correct law what was said at pages 62-63 of the opinion in that case:

"There are, of course, instances in which the application of certain federal statutes may depend on state law. . . .

"But this is controlled by the will of Congress. In the absence of a plain indication to the contrary, however, it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law. *Jerome v. United States*, 318 U. S. 101, 104, 63 S. Ct. 483, 87 L. ed. 640 (1943).

"The argument of the electric corporations fails to persuade us that Congress intended the result for which they contend. Furthermore, it ignores the teachings of the Supreme Court as to the congressional purpose in enacting the national labor laws. In *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111, 123 (1944), the Court dealt with the meaning of the term 'employee' as used in the Wagner Act, saying:

"Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no . . . patchwork plan for securing freedom of employees' organization and of collective bargaining. The Wagner Act is federal legislation, administered by a national agency, intended to solve a national problem on a national scale. . . . Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by . . . varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with

whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems.'

"Thus, it is clear that state law is not controlling and that it is to the actual operations and characteristics of [respondents] that we must look in deciding whether there is sufficient support for the Board's conclusion that they are not 'political subdivisions' within the meaning of the National Labor Relations Act."

We turn then to identification of the governing federal law. The term "political subdivision" is not defined in the Act and the Act's legislative history does not disclose that Congress explicitly considered its meaning. The legislative history does reveal however that Congress enacted the § 2 (2) exemption to except from Board cognizance the labor relations of federal, state, and municipal governments, since governmental employees did not usually enjoy the right to strike.<sup>3</sup> In the light of that purpose, the Board, according to its Brief, at 11, "has limited the exemption for political sub-divisions to entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate."

The Board's construction of the broad statutory term is of course entitled to great respect. *Randolph Electric, supra*, at 62. This case does not however require that we decide whether "the actual operations and characteristics"

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<sup>3</sup> See Legislative History of NLRA 1935, at 1117, 2653 (G. P. O. 1949); Legislative History of the Labor-Management Relations Act 1947, at 1535 (G. P. O. 1948). See also Rhyne, Labor Unions and Municipal Employee Law 436-437 (National Institute Municipal Law Officers 1946); Vogel, What About the Rights of the Public Employee, 1 Lab. L. J. 604, 612-615 (1950).

of an entity must necessarily feature one or the other of the Board's limitations to qualify an entity for the exemption, for we think that it is plain on the face of the Tennessee statute that the Board erred in its reading of it in light of the Board's own test. The Board found that "the Employer in this case is neither created directly by the State, nor administered by State-appointed or elected officials." 167 N. L. R. B., at 691-692 (footnotes omitted). But the Board test is not whether the entity is administered by "State-appointed or elected officials." Rather, alternative (2) of the test is whether the entity is "administered by individuals who are responsible to public officials or to the general electorate" (emphasis added), and the Tennessee statute makes crystal clear that respondent is administered by a Board of Commissioners appointed by an elected county judge, and subject to removal proceedings at the instance of the governor, the county prosecutor, or private citizens. Therefore, in the light of other "actual operations and characteristics" under that administration, the Board's holding that respondent "exists as an essentially private venture, with insufficient identity with or relationship to the State of Tennessee," 167 N. L. R. B., at 692, has no "warrant in the record" and "no reasonable basis in law." *NLRB v. Hearst Publications*, 322 U. S., at 131.

Respondent is one of nearly 270 utility districts established under the Utility District Law of 1937. Under that statute, Tennessee residents may create districts to provide a wide range of public services such as the furnishing of water, sewers, sewage disposal, police protection, fire protection, garbage collection, street lighting, parks, and recreational facilities as well as the distribution of natural gas. Tenn. Code Ann. § 6-2608 (Supp. 1970). Acting under the statute, 38 owners of real property submitted in 1957 a petition to the county court

of Hawkins County requesting the incorporation of a utility district to distribute natural gas within a specified portion of the county. The county judge, after holding a required public hearing and making required findings that the "public convenience and necessity requires the creation of the district," and that "the creation of the district is economically sound and desirable," Tenn. Code Ann. § 6-2604 (Supp. 1970), entered an order establishing the District. The judge's order and findings were appealable to Tennessee's appellate courts by any party "having an interest in the subject-matter." Tenn. Code Ann. § 6-2606 (1955).

To carry out its functions, the District is granted not only all the powers of a private corporation, Tenn. Code Ann. § 6-2610 (1955), but also "all the powers necessary and requisite for the accomplishment of the purpose for which such district is created, capable of being delegated by the legislature." Tenn. Code Ann. § 6-2612 (1955). This delegation includes the power of eminent domain, which the District may exercise even against other governmental entities. Tenn. Code Ann. § 6-2611 (1955). The District is operated on a nonprofit basis, and is declared by the statute to be "a 'municipality' or public corporation in perpetuity under its corporate name and the same shall in that name be a body politic and corporate with power of perpetual succession, but without any power to levy or collect taxes." Tenn. Code Ann. § 6-2607 (Supp. 1970). The property and revenue of the District is exempted from all state, county, and municipal taxes, and the District's bonds are similarly exempt from such taxation, except for inheritance, transfer, and estate taxes. Tenn. Code Ann. § 6-2626 (1955).

The District's records are "public records" and as such open for inspection. Tenn. Code Ann. § 6-2615 (1955). The District is required to publish its annual statement in a newspaper of general circulation, showing its financial

condition, its earnings, and its method of setting rates. Tenn. Code Ann. § 6-2617 (1955). The statute requires the District's commissioners to hear any protest to its rates filed within 30 days of publication of the annual statement at a public hearing, and to make and to publish written findings as to the reasonableness of the rates. Tenn. Code Ann. § 6-2618 (1955). The commissioners' determination may be challenged in the county court, under procedures prescribed by the statute. *Ibid.*

The District's commissioners are initially appointed, from among persons nominated in the petition, by the county judge, who is an elected public official. Tenn. Code Ann. § 6-2604 (Supp. 1970). The commissioners serve four-year terms<sup>4</sup> and, contrary to the Board's finding that the State reserves no "power to remove or otherwise discipline those responsible for the Employer's operations," 167 N. L. R. B., at 692, are subject to removal under Tennessee's General Ouster Law, which provides procedures for removing public officials from office for misfeasance or nonfeasance. Tenn. Code Ann. § 8-2701 *et seq.* (1955); *First Suburban Water Utility District v. McCanless*, *supra*, 177 Tenn., at 138, 146 S. W. 2d, at 952. Proceedings under the law may be initiated by the governor, the state attorney general, the county prosecutor, or 10 citizens. Tenn. Code Ann. §§ 8-2708, 8-2709, 8-2710 (1955). When a vacancy occurs, the county judge appoints a new commissioner if the remaining two commissioners cannot agree upon a replacement. Tenn. Code Ann. § 6-2614 (Supp. 1970). In large counties, all vacancies are filled by popular election. *Ibid.* The commissioners are generally empowered to conduct the District's business. They have the power to subpoena witnesses and to administer oaths in investigating district

<sup>4</sup> The commissioners' initial terms are staggered, with one commissioner appointed to a two-year term, one to a three-year term, and one to a four-year term. Tenn. Code Ann. § 6-2604 (Supp. 1970).

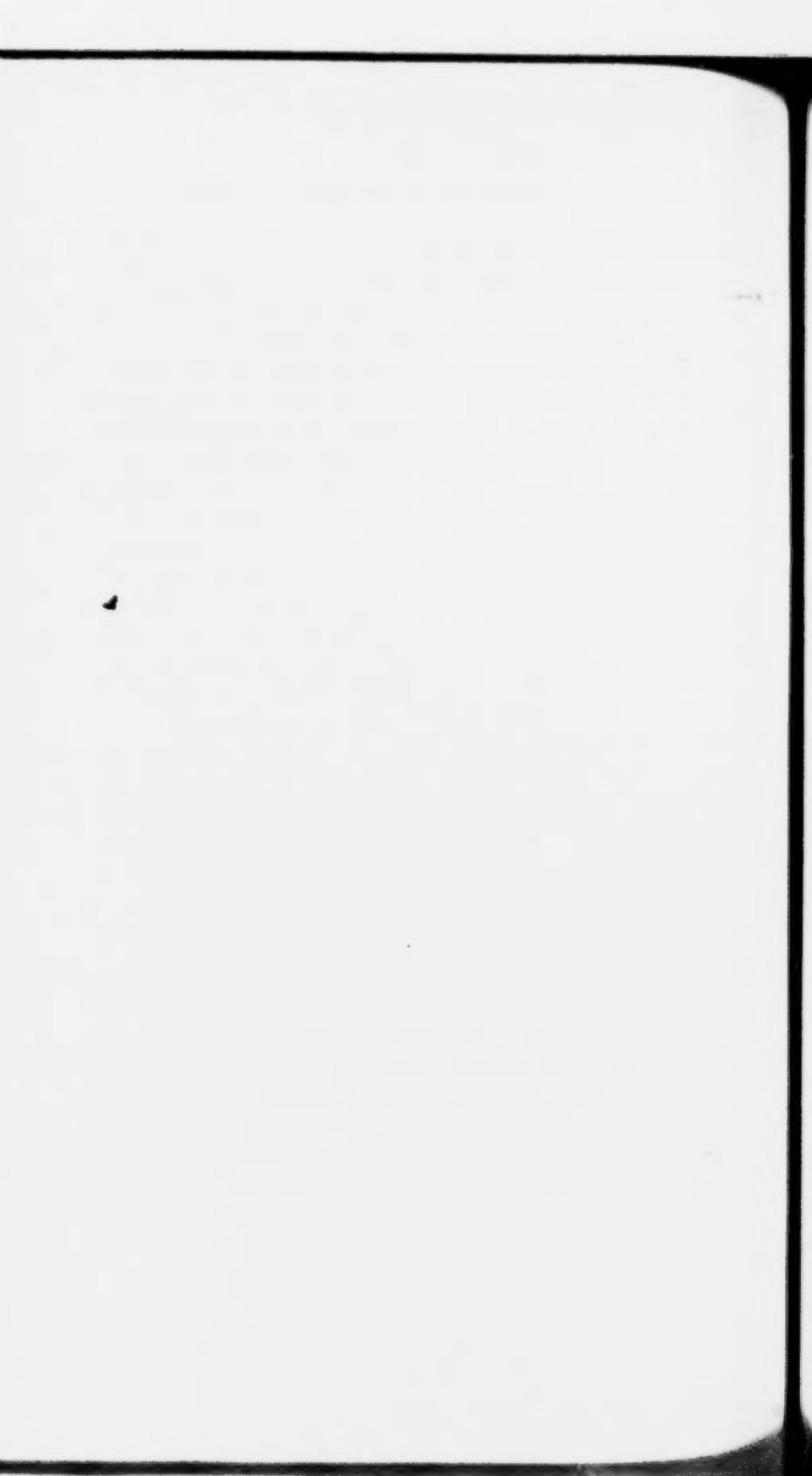
affairs, Tenn. Code Ann. § 6-2616 (5) (1955), and they serve for only nominal compensation. Tenn. Code Ann. § 6-2615 (Supp. 1970). Plainly, commissioners who are beholden to an elected public official for their appointment, and are subject to removal procedures applicable to all public officials, qualify as "individuals who are responsible to public officials or to the general electorate" within the Board's test.

In such circumstances, the Board itself has recognized that authority to exercise the power of eminent domain weighs in favor of finding an entity to be a political subdivision. *New Jersey Turnpike Authority*, 2-RC-2445, 33 L. R. R. M. 1528 (1954). We have noted that respondent's power of eminent domain may be exercised even against other governmental units. And the District is further given an extremely broad grant of "all the powers necessary and requisite for the accomplishment of the purpose for which such district is created, capable of being delegated by the legislature." Tenn. Code Ann. § 6-2612 (1955). The District's "public records" requirement and the automatic right to a public hearing and written "decision" by the commissioners accorded to all users betoken a state, rather than a private, instrumentality. The commissioner's power of subpoena and their nominal compensation further suggest the public character of the District.

Moreover, a conclusion that the District is a political subdivision finds support in the treatment of the District under other federal laws. Income from its bonds is exempt from federal income tax, as income from an obligation of a "political subdivision" under 26 U. S. C. § 103. Social Security benefits for the District's employees are provided through voluntary rather than mandatory coverage since the District is considered a political subdivision under the Social Security Act. 42 U. S. C. § 418.

Respondent is therefore an entity "administered by individuals [the commissioners] who are responsible to public officers [an elected county judge]" and this together with the other factors mentioned satisfy us its relationship to the State is such that respondent is a "political subdivision" within the meaning of § 2 (2) of the Act. Accordingly, the Court of Appeals' judgment denying enforcement of the Board's order is

*Affirmed.*



**SUPREME COURT OF THE UNITED STATES**

No. 785.—OCTOBER TERM, 1970

[June 1, 1971]

**MR. JUSTICE STEWART, dissenting.**

I agree with the Court that federal rather than state law governs the determination of whether an employer is a "political subdivision" of the State within the meaning of § 2 (2) of the Labor Management Relations Act, 29 U. S. C. § 152 (2). But I cannot agree that the Board erred in this case in concluding that the respondent is not entitled to exemption under the Act.

In determining that the respondent Utility District was not a "political subdivision" of the State, the Board followed its settled policy of weighing all relevant factors, with particular emphasis here on the circumstances that the District is neither "created directly by the state" nor "administered by State-appointed or elected officials" and is "autonomous in the conduct of its day-to-day affairs." On the other side, the Board gave less weight to the State's characterization of a utility district as an arm of the State for purposes of exemption from state taxes and conferral of the power of eminent domain.

This approach seems wholly acceptable to me, inasmuch as state tax exemption and the power of eminent domain are not attributes peculiar to political subdivisions nor attributes with any discernible impact on labor relations. Attributes which *would* implicate labor

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policy, such as the payment of wages out of public funds or restrictions upon the right of the employees to strike, are not present here.

The Court points to provisions that the records of the District be available for public inspection, and that the commissioners of the District hold hearings and make written findings. These factors are said to "betoken a state, rather than a private, instrumentality." The question, however, is not whether the District is a state instrumentality, but whether it is a "political subdivision" of the State. And the provisions in question hardly go to that issue.

The Board's reasonable construction of the Act is entitled to great weight and it is not our function to weigh the facts *de novo* and displace its evaluation with our own. The Board here has made a reasoned decision which does no violence to the purposes of the Act. Accordingly I would reverse the judgment of the Court of Appeals and remand the case with instructions to enforce the Board's order.

